





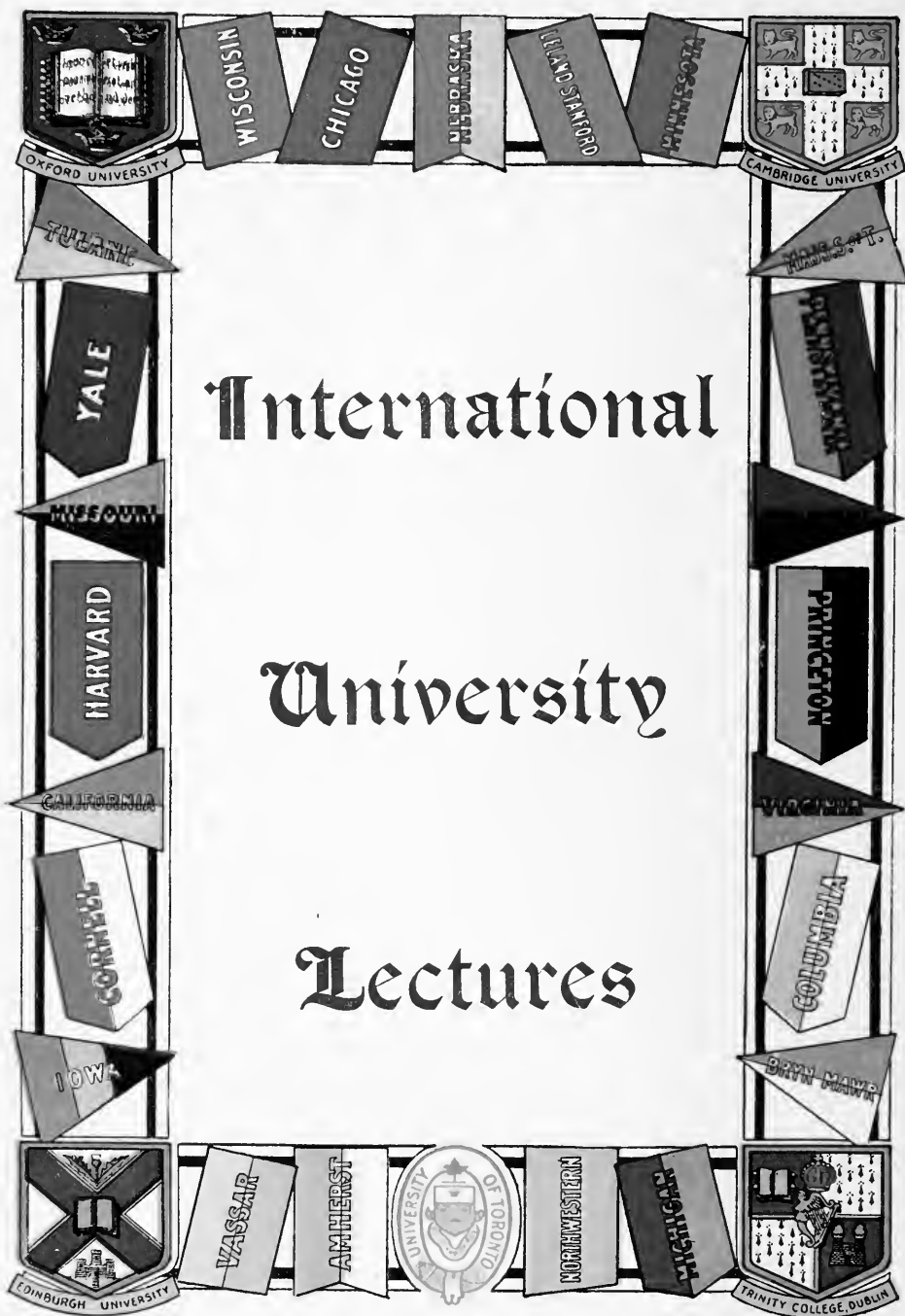




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VOLUME III.

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# SOCIAL CULTURE IN THE FORM OF EDUCATION AND RELIGION

BY WILLIAM TORREY HARRIS

[WILLIAM TORREY HARRIS, Educator and Commissioner of Education of the United States, since 1889. b. North Killingly, Connecticut, September 10, 1835. A.M. Yale, 1869; LL.D. University of Missouri, 1870; Ph.D. Brown, 1893; LL.D. Pennsylvania, 1894; *ibid.* Yale, 1895; *Ibid.* Princeton, 1896; Ph.D. Jena, 1899. Teacher, Principal, Assistant Superintendent of Public Schools, St. Louis, 1857-67; Superintendent, *ibid.* 1867-1879. At Paris Exposition, 1878, was tendered honorary title of "Officier de l'Académie;" represented United States Bureau of Education at International Congress of Educators, Brussels, 1880, and at Paris Exposition, 1889; received from French Government, 1889, title "Officier de l'Instruction Publique." Member of Washington Academy of Sciences; American Social Science Association; American Philosophical Association. AUTHOR OF *Introduction to the Study of Philosophy*; *The Spiritual Sense of Dante's Divina Commedia*; *Hegel's Logic*; *a book on the Genesis of the Categories of the Mind*; *Psychologic Foundations of Education*. EDITOR IN CHIEF of numerous compilations, notable among which being Webster's *International Dictionary of the English Language* and *International Education Series* (55 volumes).]

## I

ACCORDING to the ingenious and suggestive scheme of classification of Arts and Science adopted by the Director and Administrative Board of this International Congress, social regulation forms the sixth division and social culture the seventh division of the entire programme. Social regulation is made to include as sub-topics, politics, jurisprudence, and social science, while social culture includes education and religion. Politics and jurisprudence have to do with the state, while social science is conceived as including for its objects the civil community in its industrial, munici-

pal, and family groups, and in its providential and protective aspects.

Social culture, on the other hand, is the common name or title for the two branches of theory and practice that deal with the self-development of the individual under the direction of the church and the school.

This is our division,—the seventh and last in the entire scheme of classification,—and it is the topic of this hour's discussion to consider the unity of education and religion.

## II

I shall announce as my thesis, that: Social culture is the training of the individual for social institutions.

Man by his social institutions secures the adjustment of the individual to the social whole, the social unit. The person or individual comes into such harmony and coöperation with human society as a whole that he may receive a share of all the production of his fellow men, be protected against violence by their united strength, given the privilege of accumulating property and of enjoying it in peace and security in such a manner as to escape from sudden approaches of famine and penury by reason of seasonal extremes or by reason of the vicissitudes of infancy, old age, disease, or of the perturbations affecting the community. And finally, there is participation in the wisdom of the race, the opportunity of sharing in the knowledge that comes from the scientific inventory of nature in all its kingdoms, and of human life on the globe in all its varied experiments, successful and unsuccessful; the opportunity of gaining an insight into the higher results of science in the field of discovery of laws and principles, the permanent forms of existence under the variable conditions of time and place. Finally we may share through membership in the social unity in the moral in-

sights that have resulted from the discipline of pain, the defeat and discomfitures arising from the choice of mistaken careers on the part of individuals and entire communities. The sin and error of men have vicariously helped the race by great object-lessons which have taught mankind through all the ages, and now teach the present generation of men all the more effectively because of the devices of our civilization, which not only make the records of the past accessible to each and every individual, but institute a present means of intercommunication by and through which each people, each individual, may see from day to day the unfolding of the drama of human history.

The good of this unity of the individual with the social whole by means of institutions may be summed up by saying that it reënforces the individual by the labor of all, the thought of all, and the good fortune of all. It takes from him only his trifling contribution from his trade or vocation and gives in return a share in the gigantic aggregate of production of all mankind. It receives from him the experience of his little life and gives him in return the experience of the race, a myriad of myriads strong, and working through millenniums.

What Thomas Hobbes said of the blessings of the political whole, the state, is true when applied to civilization as an international combination of states.

"Outside of the state," said he, "is found only the dominion of the passions, war, fear, poverty, filth, isolation, barbarism, ignorance, and savagery; while in the state is found the dominion of reason, peace, security, riches, ornament, sociability, elegance, science, and good will."

With this point of view we see at a glance the potency of the arts of social culture, fitting as they do the individual for a coöperative life with his fellow men in the institutions of civilization.

## III

My thesis proceeds from this insight to lay down the doctrine that the first social culture is religion and that religion is the foundation of social life in so far as that social life belongs to the history of civilization. Religion in the first place is not merely the process of an individual mind, but it is a great social process of intellect and will and heart. Its ideas are not the unaided thoughts of individual scholars, but the aggregate results of a social activity of intellect, so to speak, each thought of the individual being modified by the thought of his community, so that it comes back to the individual with the substantial impress of authority.

There is a religious social process, the most serious of all social activity. In it the religious view of the world is shaped and delivered to the individual by authority such as cannot be resisted by him except with martyrdom. Each modification in the body of religious doctrine has come through individual innovation, but at the expense of disaster to his life. He had to sacrifice his life so far as his ordinary prosperity was concerned, and his doctrine had to be taken up by his fellow men acting as a social whole, and translated into their mode of viewing divine revelation before it effected a modification in the popular faith. It was a process of social assimilation of the product of the individual comparable to the physiologic process by which the organs of the body take up a portion of food and convert it into a blood-corpuscle before adding it to the bodily structure.

So in the living church of a people goes on forever the great process of receiving new views from its members, and its members include not only the Saint Bernards, but also the Voltaires. The church receives the new views,

but does not by any means adopt them until it has submitted them to the negative process of criticism and elimination, and finally to the transforming process that selects the available portions for assimilation and nutriment. This is certainly the slowest and most conservative spiritual process that goes on in civilization. But it is by all means the most salutary. The individuals that suggest the most radical modifications are swiftly set aside, and their result is scarcely visible in the body of faith transmitted to the next generation.

It is clear this conservatism is necessary. Any new modification of doctrine gets adopted only by the readjustment of individuals within the communion or church. All the inertia of the institution is against it. Again, it is not only necessary but desirable, because it is a purification process, the transmutation of what is individual and tainted with idiosyncrasy, into what is universal and well adapted for all members within the communion. The church must prove all things and hold fast to that which can stand the test. The test is furnished by what is old, by what is already firmly fixed in the body of religious faith. If its foundations could be uprooted so that religion gave up the body of its faith, all authority would go at once to the ground, and with it the relation of the institutional whole to the individuals within it. Such an event can scarcely be conceived in a realizing sense, but a study of the Reign of Terror in the French Revolution aids one to gain a point of view. When a citizen finds himself in a social whole in which all the principles that have governed the community have become shaky, he gets to be unable to count on any particular set of social reactions in his neighbors from day to day, or to calculate what motives they may entertain in their minds in the presence of any practical situation. He is forced into an attitude of universal

suspicion of the intentions of his fellow men, and he is in his turn a general object of suspicion himself. The solution forced on the community is the adoption, by the committee of safety, of death for all suspected ones. But the more deaths the more suspicion. For the relatives of the slain, those who yesterday were with us, but who endeavored to dissuade us from guillotining their parents, brothers, or cousins,—as to those we are warranted in suspecting that they to-day are planning a new revolution and to-morrow may put us to death.

We may by this, after a sort, realize the situation when the foundations of religious belief are utterly broken up.

Fortunately for us our civilization carries with it even under varying creeds, sects, and denominations, the great body of religious belief unquestioned. Only the Nihilists offer a radical denial to this body of Christian doctrine, and we can see how easily we might come to a Reign of Terror if it were possible to spread this Nihilistic doctrine widely among any considerable class of our people. For the Nihilistic view would extend its death-remedy after the destruction of its enemies, to its own ranks, and guillotine its own Robespierres by reason of suspicion and distrust entertained toward one's accomplices.

The substantiality of the view of religion is the basis of civilization. It holds conservatively to elementary notions of an affirmative character such as the monogamic marriage, the protection of helpless infancy in certain fundamental rights, the protection of women, the care for the aged and the weaklings of society, private ownership of property, including under property land and franchises as well as movable chattels. The church includes in its fundamentals the security of life against violence, and makes murder the most heinous of crimes. It insists on respect for established law and for the magistrates themselves. It



even goes so far as to protect the heretic and to insure the private right of the individual to dissent from the established or prevalent religious creed so far as church worship or dogmas of theology are concerned. It is obvious that the community as a social whole would be obliged to limit its toleration of private creeds were there a great extension of Nihilism possible or were there to arise sects that attacked the sacredness of the family institution—by polygamy, for example, or by the abolition of marriage; or sects that attacked civil society by attempting practically to abolish the ownership of property (Proudhon said. "All property is robbery"); or by the denial of the right of laborers to contract with employers for their labor.

When we study these fundamental ideas common to the different confessions of our composite church, we see at once how powerful is the established doctrine of the prevailing religious ideal in our civilization in exerting an authoritative control over individuals as to belief and practice.

#### IV

Many people have come to believe, in this age of greatly extended religious toleration, that the church as an institution is moribund and that its authority is about to disappear wholly from the earth in an age of science, of the ballot-box, and of universal secular education at public expense. It would seem to them that public opinion is sufficient or about to become sufficient by means of the newspaper and the book to secure life, personal liberty, and the peaceful pursuit of happiness without the necessity for a religious provision for social culture. Only the culture that comes from the secular school is adjudged to be necessary for all.

For the proper consideration of this question it is neces-

sary to take up more fundamentally the origin and real function of religion. We shall find two fundamental views of nature and man the foundation of two opposite religious movements in the world's history—the Christian and the Oriental. According to one of these views our free secular life, our science and the arts, our literature and our productive industry and our commerce, are utterly perverse and not to be tolerated on any terms.

A year ago or more there was published a letter written by an Arab sheik of Bagdad to the editor of a Paris newspaper (*La Revue*, for March, 1902), in which he expressed admiration for certain external characteristics of European civilization, but found no words bitter enough for his detestation of the Christian religion professed by all European nations. To him it was all a horrible blasphemy. The pure One as preached in the Koran is sovereign and transcendent, and to speak of it as divine-human, or as triune in the Christian sense, is to the Mohammedan an act of unspeakable sacrilege. Therefore, if our triumphs in science and art flow from our religion, the worshiper of Islam must regard them as his mortal foe.<sup>1</sup> And yet the

<sup>1</sup> *Le Dernier mot de l'Islam à l'Europe*, par le Sheik Abdul Hagk de Bagdad, Paris, *La Revue*, no. 5, March 1, 1902. Passage translated from the beginning:

"Christian Peoples: The hatred of Islam against Europe is implacable. After ages of effort to effect a reconciliation between us, the only result to-day is that we detest you more than ever. This civilization of yours and its marvels of progress which have rendered you so rich and so powerful, be it known to you, that we hate them and we spurn them with our very souls. . . . The Mohammedan religion is to-day in open hostility against your world of progress. . . . We explain how it is that we spurn with horror not only your religious doctrines but all of your science, all your arts, and everything that comes from Christian Europe. . . . I, the humble Sheik Abdul Hagk, member of the holy Panislamic league, come with a special mission to explain clearly how this comes to be. . . . Our creed is this: There is in the universe one sole being, God, source of all power, of all light, of all truth, of all justice, and of all goodness; He has not been generated; He has not generated any one. He is single, infinite, eternal; alone, He wished to be known; He made the universe, He created man. He surrounded man with the splendors of creation and imposed on him the sacred duty of worshipping Him alone. To worship continually this only God is man's only mission on earth. Man's soul is immortal; his life on earth only a probation; . . . the supreme duty of man to worship the only God and to sacrifice himself to Him without reserve; the sum of all iniquity to renounce the only God and to worship a false God. . . . For us Mussulmans there is a world containing only two kinds of human beings, believers and infidels (*mécéants*); love, charity, brotherhood to the believers; contempt, disgust, hatred, and war for the infidels. Among the infi-

Arab sheik is much nearer to the Christian view than is the Buddhist or the Brahmin. The East Indian view holds a first principle that repudiates or shuts out from its attributes consciousness and will and feeling—all the elements of personality. But the Allah of the Koran is personal and in an important sense ethical, having the attributes of righteousness and goodness borrowed from the Old Testament by the Hanyf preachers of the Ebionitic sect of Old Testament Christians who proselyted Mohammed, as shown by Sprenger.<sup>1</sup> But Brahma is above the ethical distinctions of good and evil, and goodness and righteousness are as naught to him and to the Yogi who seeks by mortification to get rid of his selfhood.

Let us endeavor to find, by the well-known road taken by the philosophy of history, the twofold root of all human experience which gives rise to the religious insights which in their first form of external authority govern human life before the advent of the stage of reflection and individual free thought—religion before secular education.

## V

Examine life and human experience as we may, we find our attention drawn to two aspects, or opposite poles, so to speak, of each object presented to us.

The first aspect includes all that is directly perceivable by the five senses, sight, sound, smell, taste, and touch. This is the aspect of immediate existence.

But experience begins at once to go beyond the immediate aspect and to find that it is a product or effect of out-

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dels the most hated and the most criminal are those who worship God but ascribe to Him earthly parents, or fatherhood, or a human mother. Such monstrous blindness seems to us to surpass all measure of iniquity; the presence among us of infidels of this kind is the plague of our life; their doctrine is a direct menace to the purity of our faith; contact with them is defilement, and any relation with them whatever a torment to our souls."

<sup>1</sup> *Das Leben und die Lehre des Mohammed*, Berlin, 1869, chapter I, pp. 16-27, 37-47, 60, 69, 70-77, 101-107.

lying causes. We are not satisfied with it as an immediate existence; it now comes to be for us an effect or mediated existence.

If we call the first aspects an effect, we shall call this second aspect a causal process.

Each immediate object, whether it be thing or event, is an effect, and beyond it we seek the causes that explain it. The first pole of existence is, therefore, immediate existence, and the second is the causal chain in which the object, whether it be considered as thing or as event, is found.

Since the causal process contains the explanation of immediate existence, the knowledge which is of most importance is that knowledge which includes the completest chain of causation. It is the knowledge of primal cause which contains the fullness of explanation. And the mind of the human race has devoted itself chiefly to the question of first cause.

In this search, as already suggested, it has been the mind of the social whole of a people that has done the thinking rather than the minds of mere individuals. Even the most enlightened individuals and the most original and capable ones have borrowed the main body of their ideas from the religious tradition of their people, and their success in effecting modifications and new features in the existing creed has been due to the coöperation of like-minded contemporaries which assisted the utterance of the new idea so far as to make it prevail. Again the collisions of peoples settled by war and conquest have brought about new syntheses of religious doctrine, which have resulted in deeper religious insight and more consistent views of the divine nature.

It has been the long-continued process of pondering on the second aspect of things and events, the second pole of experience, that has reached the religious dogmas of the

greater and greatest religions of human history—a process of social units in which whole peoples have merged.

This process has been a study of the question how the perfect One can be conceived as making a world of imperfect beings. For imperfect or derivative beings demand another order of being, an originating source, as a logical condition of existence. But this source must explain not only the efficient cause of the imperfect, but also the motive of purpose, the final cause or end of the creation of the imperfect being.

There are two great steps which religion takes after it leaves ancestor-worship and other forms of animism, in which disembodied individuals as good or evil demons reign as personal causes in an order above the natural order of things and events which are immediately present to our senses.

As the intellect of man became developed, socially and individually, the great step was taken above all secondary causes to a First Cause transcending nature and also transcending time and space, the logical conditions of finitude and multiplicity.

The transcendent unity, in which all things and events lost their individual being and mingled in one chaotic confusion, is conceived as a great void into which all things and events are resolved when traced to their first principle.

Transcendence was in the first stage of religious contemplation the important attribute to be kept in mind when thinking of the First Cause.

To halt in this thought of mere transcendence of the world meant pantheism in the sense that the One is conceived to possess all being and to be devoid of finitude. It exists apart in an order above all finitude as found in our experience. To deny all relation to finitude comes as

a result from this abstract thought of the infinite. It is the nothing of the world of experience and is to be thought of as its dissolution. The philosophy of Kapila in the Sankhya Karika, the religion of both the Yoga doctrines, the Yoga of complete asceticism (of Patanjali) as well as the Karma Yoga expounded in the Bhagavad Gîtâ, reach a One not only above things and events and above a world-order, but also elevated even above creatorship, and above intellect and will, a pure being that is as empty as it is pure, having no distinctions within itself nor for others—light and darkness, the widest distinction in nature, are all the same to Brahma, and so also are good and evil, sin and virtue, “shame and fame,” as Emerson names these ethical distinctions in his poem of Brahma,—they are all one to Brahma.

## VI. *Theism*

When the social mind had reached this insight of the transcendence of the great First Cause we see that it lost the world of things and events and had annulled one of the two poles of experience which it was attempting to explain. And it had left in its thought only a great negative abstraction, pure being or pure naught, with no positive distinctions, not even consciousness nor the moral idea of ethics, goodness, and righteousness or mercy and justice. It was obliged to deny the creation altoæther and conceive the world as a vast dream, a maya.

Asia's chief thought is this idea of transcendence of the one First Cause, above the world and above creation and creative activity. But in the Old Testament we have the last word of Asia; it reveals an insight which reacts against the thought of this abstract oneness as transcendental Being and sets in its place the idea of a creator.

God as creator makes the world, but does not lose his



sovereignty by this act. He also retains consciousness, inward distinction; he is personal, having intellect and will and also feeling.

The pantheistic idea which conceived God only as the transcendent One followed its thought out to the denial of all creative activity and even to the denial of all inward distinction of subject and object. It ended its search for a First Cause (following out the causal line which it began with) by denying causality altogether and finding only a quiet, empty being devoid of finitude within itself and annihilating objective finitude altogether. Hence its search ended with the denial of true being to the world and to man.

But this self-contradiction was corrected by the israelitic people, who felt an inward necessity—a logical necessity—of conceiving the First Cause as active, both as intellect making internal distinctions of subject and object, and also as a free will creating a world of finite reality in which it could reveal itself as goodness. The essence of goodness, in the Old Testament sense of the idea, consists in imparting true being to that which has it not. God creates real beings. Goodness not only makes others but gives them rights; that is to say, gives them claims on its consideration.

While Orientalism with the single idea of transcendence or sovereignty arrived at the idea of a One without the many, and at a consequent destruction of what it set out to explain, theism found a First Cause that could explain the world as created by an ethical being, a personal One that possessed what we call "character," namely, a fixed self-determination of will, of which the two elements were goodness and righteousness. This doctrine conceived ethics as a fundamental element in the character of the Absolute, a primordial form of being belonging to the First Cause.

Time and space according to the first form of religion—

that is to say, according to the first completed thought arrived at by the social intelligence of the race—are illusions and producers of illusions. All illusions arise in the primordial distinction of subject and object which constitutes the lapse into consciousness out of primeval unity which is not subject and object.<sup>1</sup> This thought of Kapila becomes the basis of the religion of Buddhism, the religion founded on the simple idea of transcendence of the one First Cause above all causality. This is opposite to the religion of the Bible, which reveals the divine as a One that is goodness. Goodness is so gracious as to create and give independent reality to nature and man, in short, to make man able to sin and to defy the First Cause his Creator. Here emerges for the first time the idea of sin. Man, as *maya* or illusion, is not created nor is he a creator of things or events; his deeds are only seeming, for he does not possess true reality himself. But with the doctrine of theism, man has an eternal selfhood given him and is responsible for the acts of his will; he can sin and repent.

He can choose the ethical and form in himself the image of God, or on the other hand he can resist the divine and create an Inferno.

While theism commands man to renounce selfishness, pantheism commands to renounce selfhood.

Theism contains in it as a special prerogative the possibility of meeting difficulties insoluble to pantheism. It has solved the great difficulty of conceiving a First Cause so transcendent that it is no cause of the world and man. For theism sees the necessity of goodness and righteousness in the First Cause, and hence finds the world and man in the divine mind. But it, too, sees divine sovereignty and does not lose that thought in its theory of man and nature. Nature is full of beings that perish, notwithstanding

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<sup>1</sup> Memorial verses of the Sankhya Karika, Nos. XXI, XXII, XXIV, LXII, LXIV.

ing the fact that they come from a perfect Creator. The history of man is full of sin and rebellion against goodness and righteousness. But our theistic insight knows that God is holy; that he possesses perfect goodness and righteousness. The exclusive contemplation of the imperfections of man and even of his best works leads to the pantheistic denial of the world and to despair as to man's salvation before the sovereign First Cause. The religion of theism often lapses towards Orientalism in its condemnation of nature and history as empty of all good. Whenever it has gone so far that it blasphemes the first Cause by limiting divine goodness, the church has given a check to this tendency and ushered in an epoch of missionary effort, wherein the true believer leaves off his excessive practice of self-mortification and devotes himself, like St. Francis, to the work of carrying salvation to the lost. It goes out like St. Dominic to save the intellect and to have not only pious hearts but pious intellects that devote their lives to the study of the creation, trying to see how God works in his goodness, giving true being to his creatures, and lifting them up into rational souls able to see the vision of God.<sup>1</sup>

## VII

The piety of the intellect contains in it also another possibility of lapse into impiety of intellect, namely, through lack of power to hold to the sovereignty of God. It may go astray from the search of the First Cause and set up secondary causes in place of a First Cause. This is the opposite danger to pantheism, which gets so much intoxicated with the divine unity that it neglects nature and history and discourages intellectual piety and loses the insight into the revelation of God's goodness and righteousness in the creation of the world.

<sup>1</sup> See Goethe's *Faust*, "Scene in Heaven" (part II, act v, scene 7), *Pater Profundus* and *Pater Seraphicus*.

There are two kinds of intellectual impiety, one kind that goes astray after a secondary cause in place of a First Cause, and the other that passes by secondary causes as something unworthy of the true First Cause, not seeing that the true First Cause makes the world with its three orders of being: the lower ministering to the higher and the higher to the lower,—an inorganic below an organic realm,—and within the organic realm creating the animal below the man, and among the races of man making savages below the civilized peoples. It does not see that in all these divine goodness has its own great purpose—to make the world of time and space an infinite cradle for the development of spiritual individuality. The Christian God is not an abstract One, delighting only in abstract ones, but a Creator delighting in creators, commanding true believers to engage in the eternal work of the First Cause, namely, by multiplying his creative and educative work.

Thus from one or another form of impiety of the intellect there arise collisions with the church from age to age.

A closer and closer definition of the dogma arises out of the struggle.

One of the greatest epochs of struggle in the church arose in the time of the importation of Arabian pantheism into Spain, and thence into the other parts of Europe by reason of resort of Christian youth to the medical schools established by the Arabs.

The great commentators on Aristotle, Avicenna and Averrhoës, came to notice and caused great anxiety by their interpretation of Aristotle's doctrine of the active reason (*νοῦς ποιητικός*), which they held to exist only in God; and upon the death of the individual, the passive soul or reason (*νοῦς παθητικός*), which is conceived by them as a temporary manifestation of the active reason, withdrew, and was absorbed into the deity, losing its individual being.

To Christianity the doctrine of individual immortality is vital. Without it the world-view of the church would suffer dissolution.

The publication of the pantheistic version of Aristotle forced Christian scholars to study seriously the Greek philosophy. Piety of the heart and piety of the will did suffice. Piety of the intellect was needed, and it came in a series of thinkers who wrote the expositions of Christian theology of which the *Summa theologiae* of Thomas Aquinas is the great exemplar. Piety of the intellect overcame the dangers of religious heresy.

After an epoch of rapid philosophical development—a period of a too exclusive devotion to the piety of the intellect—these came a decadence in the piety of the will and the piety of the heart, and when this began to have its visible effects in the neglect of the secular interests of the church a reaction set in, which culminated in the triumph of the pestilent doctrine of nominalism through the dialectic skill of William of Occam, and as a consequence the great philosophy of Saint Thomas of Aquino fell into neglect. But this gave an opportunity for the triumph of the study of secondary causes. Natural science began new inventories of nature and new studies of mind which set forth theories almost mechanical in their results.

With nominalism no speculative investigations into the nature of a First Cause are permissible. All that is left is an empirical study of things and events,—an inventory and a classification,—theories of forces, mechanical composition and decomposition of bodies, the transformation of sensations into ideas. Ideas were regarded as of the nature of mere opinions and of less truth than the sensations which furnish the only vivid certainty esteemed to be of real worth.

There is bound to arise a reaction against religious

authority whenever the church itself neglects the exposition of the intellectual insights which are the most vital part of its contribution to civilization. For if the Christian world-view is rendered untenable, the piety of the will and the piety of the heart will soon decay.

A series of skeptical reactions not only against the church, but against the authority of the state, have taken place as a result of this movement away from theology and towards an exclusive study of secondary causes.

The German word *Aufklärung*, or clearing-up of the mind, has become more or less familiar to us as including the phases of this revolt against authority. It holds to the study of secondary causes and the neglect of the First Cause.

## VIII

There has been only one great *Aufklärung*, the French Revolution, which swept together all the negative tendencies into one movement of destruction to church and state. But there are numerous, very numerous minor movements. In every department its influence is felt.

In the last half of the nineteenth century Herbert Spencer occupied, and still occupies, much attention. It is interesting to note that in his generalizations of science he adopted the agnostic view of his system from Hamilton and Mansell. Back of that view is Hume's skepticism especially with regard to the category of causality, and it would not be difficult to trace his extreme nominalism to the stream of influence that William of Occam set flowing within the church.

Herbert Spencer's theory of the world resembles in a marked manner the doctrine of the Oriental mind that the world-process finally comes to nothing. One after another, things and events appear and then vanish again and all re-

mains as at first.<sup>1</sup> It is a Sisypus movement with no permanent outcome and no worthy result. It begins with the homogenous, undifferentiated condition of matter and moves towards heterogeneity, individuality, and complexity of function. Evolution is this process of individualization. But all evolution is to be followed by dissolution, a return to the chaotic and unindividualized state of the homogeneousness which Spencer considered to be unstable and, so to speak, impelled to evolution, but which in the end becomes unstable again and seeks its equilibrium in chaos.

One of the chief leaders of the *Aufklärung* has thus returned to Orientalism, and his infinite and eternal is only an unknown and unknowable power—he calls it “unknown and unknowable,” though he lets us clearly see that there is a shuttle motion produced by it out of chaos into individuality and from individuality back again into chaos.

A creative goodness which lifts into being an infinity of other selves of animals and men, only to swallow them up again by a jealous reaction, drawing them down into the homogeneous ocean of chaotic matter, deserves rather to be called, as Plato in the *Timaeus* and Aristotle in his

<sup>1</sup>“Evolution,” says Spencer, in that concise statement of his system found in his *Autobiography*, vol. 1, pp. 650-652, “Evolution . . . is a movement (6) not simply from homogeneity to heterogeneity, but from an indefinite homogeneity to a definite heterogeneity; and this trait of increasing definiteness, which accompanies the trait of increasing heterogeneity, is, like it, exhibited in the totality of things and in all its divisions and subdivisions down to the minutest. (7) Along with this redistribution of the matter composing an evolving aggregate, there goes on a redistribution of the retained motion of its components in relation to one another; this also becomes, step by step, more definitely heterogeneous. . . . (13) Dissolution is the counter-change which sooner or later every evolved aggregate undergoes. Remaining exposed to surrounding forces that are unequilibriumed, each aggregate is ever liable to be dissipated by the increase, gradual or sudden, of its contained motion; and its dissipation, quickly undergone by bodies lately animate, and slowly undergone by inanimate masses, remains to be undergone at an indefinitely remote period by each planetary and stellar mass, which since an indefinitely distant period in the past has been slowly evolving, the cycle of its transformations being thus completed. (14) This rhythm of evolution and dissolution, completing itself during short periods in small aggregates, and in the vast aggregates distributed through space completing itself in periods which are immeasurable by human thought, is, so far as we can see, universal and eternal—each alternating phase of the process predominating, now in this region of space and now in that, as local conditions determine. . . . (16) That which persists, unchanging in quantity but ever changing in form, under these sensible appearances which the Universe presents to us, transcends human knowledge and conception,—is an unknown and unknowable Power, which we are obliged to recognize as without limit in space and without beginning or end in time.”

*Metaphysics* called it, envy and jealousy (*φθόρος*), a quality of mind which they thought not possible to find in the idea of God as Creator.

The only effective counter-movement against the *Aufklärung* is the return to a study of the First Cause.

This does not mean the neglect of secondary causes, but their proper adjustment. It is an application of the great results of religious thought—a social institutional kind of thinking that should be gone over by every individual for his enlightenment. The church should elaborate its application of the thought of the First Cause to all secondary causes, showing in each case how the divine goodness connects and explains the entire movement from the mechanical to the chemical, and from these to the crystal, the plant, the animal, and to man.

## IX

I review, in concluding my paper, the line of argument based on the second or causal aspect of experience:

(1) The first religious step is taken when all secondary causes are aggregated into one group and included in the world-order, in what we have called the first pole of experience. Ancestor-worship with its infinite series of finite spirits belongs only to a world-order. A true originating causality, a first cause, belongs to a second and higher order, to a self-determining or originating order of being which transcends the world of things and events; all things and events depending upon a being derived from beyond, and not in themselves possessing self-existence, and the true second order possessing independence, self-existence, and the power to produce duality by consciousness, will, or some other form of self-determination.

(2) The first thinking of this transcendent being becomes absorbed in the contemplation of its transcendence,



or its sovereignty over the first order. While the first order is dependent and must derive its support, all that it has, from a higher order of being; the second order is independent and can exist by itself. The religious contemplation is absorbed in this fact of independence or transcendence; it searches the origin of the dependent order in the sovereignty of the independent order; but it does not find at first, in the independent, the motive for the dependent. It halts in the thought of transcendence and denies reality to the world of things and events; it becomes pantheism or Orientalism; it denies creatorship in the first principle.

(3) The result of the first insight into the presupposition of dependent being has reached an independent being which is devoid of true causality and which does not impart its true being to a derived world; this is pantheism. But, again, this result contradicts the presupposition on which the insight into the second order is based. For unless there is presupposed a true originating causality, a self-determining One, the higher order of being exists only in itself and not for itself; its causality is not real to itself; if its causality produces only a world of phenomenality and illusion, then the result of its causality is only to reveal to the independent being its own inefficiency as a cause; it is a cause which cannot produce anything real, hence it is not a true cause.

(4) The history of the religions of Asia is a history of the discovery of the self-contradictions of pantheism—of a true causal being which does not truly cause. It is also a series of attempted solutions to introduce true causality without destroying the transcendence or sovereignty of the First Cause. For to introduce any finite motive, that is to say, any motive depending upon another underived being, would destroy the perfection of the first original cause and reduce it to a secondary cause and thus throw back the en-

tire investigation to the stage of ancestor-worship. The escape from this dilemma, which offers a choice between the destruction of the imperfect world and the destruction of the perfect world, *i. e.*, its renunciation by philosophic thought, is found in the doctrine of the Logos and its complete exposition in the Christian doctrine of the Trinity.

(5) True causality is the self-revelation of the highest order of being. But it does not in its pure self-determination reach secondary causes. Its action in itself is the revelation of a perfect in a perfect; this is the doctrine of the Logos. Perfect self-determination results in perfect revelation in another, an eternal object becomes an eternal subject whose thinking and willing are one, and hence goodness and righteousness. Through this thought it is explained how the primary causality in the Logos becomes secondary causality through the contemplation of goodness and righteousness as the inner essence of causality.

(6) The Christian view of the world, therefore, does not compromise its idea of the transcendency or sovereignty of the First Cause, but preserves it perfectly and at the same time introduces transcendency into the world-order by the doctrine of the immortality, freedom, and responsibility of the human soul who, through religious insight, interprets the entire world-order as a process of creation and salvation; the process of creating souls with independent individuality and infinite powers of self-development in will and intellect, in goodness and righteousness. Consciousness proceeds through science and philosophy and theology everlastingly towards a completer comprehension of the divine method of creation of real being, that is to say, of moral beings through the inorganic and the organic processes in time and space and through the discipline of moral beings by means of their historic experience of life. This development of consciousness makes possible the coöpera-

tion of the human will with the divine will. This is the ultimate cause presupposed by secondary causation. It is the second aspect of experience in its fullness and perfection.

(7) This view of the world elevates it into the highest significance, not through its secondary causes, but through its first cause as the divine self-activity in its goodness and righteousness. It is infinite grace.

(8) This view of the world makes secondary causes significant in the light of the First Cause. It makes the history of nature thus interpreted a part of the book of divine revelation.

(9) With the pantheistic interpretation the divine purpose disappears from the realm of secondary causes, and with this there vanishes all true causality and high significance to science. For the objects of science, namely, material nature and human history, when separated from the divine and devoid of a share in the causal activity of a transcendent being who is a real cause, become a chaos or illusion, the East Indian maya.

(10) In the ruder forms of religion, the varieties of ancestorship and fetichism, science has no place, because all secondary causes become capricious activities of spiritual beings not subordinated to a first principle of goodness and righteousness.

(11) It follows from these considerations that social culture in the form of the church and the school as independent institutions becomes possible only on the basis of the religious world-view of Christianity; and that the perennial continuance of the world-view of Christianity through the special form of social culture which belongs to the church is a necessary condition presupposed by the forms of social culture intrusted to the school.



# EDUCATIONAL METHODS AND PRINCIPLES OF THE NINETEENTH CENTURY

BY ARTHUR TWINING HADLEY

[ARTHUR TWINING HADLEY, President of Yale University. b. New Haven, Connecticut, April 23, 1856. B.A. Yale, 1876; LL.D. Harvard, Johns Hopkins, Columbia, *et al.*; Post-graduate, Berlin, 1878-79. Commissioner of Labor Statistics of Connecticut, 1885-87; Professor of Political Science, Yale, 1886-99; one of the original members of the International Institute of Statistics; lately President of the American Economic Association. AUTHOR OF *Railroad Transportation; Economics; Education of the American Citizen; Freedom and Responsibility*. American EDITOR-IN-CHIEF OF *Encyclopaedia Britannica*.]

THIS is hardly the time or the place for a discussion of the general theory of education. The subject is too broad to be handled in forty minutes, too abstruse to be made the theme of a popular address. It will, I think, serve our purpose better if in place of any such general discussion of educational principles and methods we content ourselves with seeing what has been most distinctively characteristic in the principles and methods of the nineteenth century as contrasted with those of the ages which have preceded.

A feature that has distinguished that century, in almost every department of human affairs, has been its emphasis on the rights and powers of the individual. We have seen a growth of individual liberty in politics and economics. We have witnessed a development of individual methods in science and in art. In all the varying fields of human activity we have tried to give each man the chance to form his own conceptions of happiness and success and pursue them in his own way. It was inevitable that the same tendency should have shown itself in our educational ideals and methods. Where earlier centuries strove to establish

types of character or of thought or of conduct, and make individual boys and girls conform to these preconceived types, we have tried rather to take actual boys and girls, actual men and women, and make the most of their several capacities. Psychologists, with methods as diverse as Froebel on the one hand and Spencer on the other hand, had agreed in this cardinal principle of educational theory. Practical organizers the world over, from Horace Mann at one end of the century to Levasseur at the other, however different the problems with which they had to deal, shaped them toward this common end. We came to regard the development of the individual as the goal of education. Some of us have even come to regard it as an axiomatic and self-evident goal; to be surprised that people in other times or countries could have sought other ends than this; to misjudge the educational systems of the past on account of their failure to conform to nineteenth-century standards. Many a writer on education is prone to treat the schools of previous ages as though they represented a very bad attempt to do what we are doing to-day, instead of a tolerably good attempt to do something totally different.

Let us see, if we can, how this pursuit of individual development manifests itself in different kinds of schools at the present time. We may well begin with the matter of professional training. This is the field of education where the aim is plainest. This is where the variety of the problems is least. This is, therefore, the point where we can see the distinctive features of the school system of any age or country most sharply exemplified.

The first difference that strikes us in the new professional training as compared with the old is the vastly greater amount of time which is accorded to it and of emphasis which is placed on its importance. In earlier ages there was no well-developed system of technical schools except

for the three so-called learned professions—clerical, legal, and medical; and even in these callings the student obtained most of his real training in the actual experience of the office or the forum rather than in the preliminary work of the classroom. To-day all this has changed. In the learned professions what was formerly a brief and somewhat profitless course of study has been greatly extended in length and animated by new life and new methods. Preparation for medicine, for instance, involves not only a longer course of study in the medical school than it once did, but a time of combined study and work in the hospital, which is now recognized as an essential element in thorough training. In other professions, like the different departments of engineering or technology, special schools of a character hardly known at the end of the eighteenth century have multiplied themselves during the nineteenth until they have become more numerous and more largely attended than the old schools of theology or law or medicine. The soldier has learned that he cannot despise the theory of his trade; and this has led to the establishment, first in France and then in other countries, of military or naval academies of a high order. The success of these schools in training military engineers has led to the establishment of other colleges of engineering for men who intended to apply mathematical science to the arts of peace rather than of war. From these engineering colleges it was but a step toward the establishment of technological instruction in every line where a profound knowledge of physics or chemistry is necessary to fit a man for the most successful prosecution of his work. We have seen the establishment of schools of art in its various forms. We have in more recent years witnessed the extension of the principle of professional education so as to afford training for the more purely mechanical pursuits which involve no profound

knowledge of mathematics or chemistry and no long-continued or exhaustive study such as is necessary for the pursuit of art or letters; schools which take people who are under the necessity of earning a living and have little time to spare in education, in order to give them, in this little time, the opportunity to earn that living more honorably and more successfully.

And this brings us to another point which distinguishes the professional education of the nineteenth century from that which preceded it. I refer to the character of the modern technical school as a place where the individual learns to achieve success. The earlier professional colleges were occupied with the creation and maintenance of standards of thought and of conduct rather than with the practical end of fitting the student for his lifework. The old-fashioned school of theology was chiefly concerned to uphold orthodox traditions and to maintain a spiritual atmosphere favorable to the perpetuation of such traditions. Nor was the old-fashioned school of law or medicine very different from this. The student was brought under the influence of a code of professional ethics which helped to uphold the dignity of his calling. If the teacher could inspire the pupils with this class spirit and these special standards of honor inherited from past ages, it was regarded as somewhat immaterial whether he taught him anything else. Not a few of the scientific teachers of past centuries have made it their boast that they never did anything so commonplace as a dissection or an experiment in their classrooms. To-day the case is far different. We no longer seek to maintain standards; we seek to accomplish results. We try to fit the pupil to do something. If our ideals are high, we wish to enable him to do something to benefit his fellow men. If they are a little lower, we teach him to do something which will increase his reputation. If they are



on that low plane which always characterizes a certain proportion of our professional teaching, we are chiefly concerned to prepare him to make money. But whether its purpose be high or low, the nineteenth-century technical school, whether for learned professions or unlearned, is occupied to an overwhelmingly large extent with the teaching of things which will lead each man to accomplish tangible success for himself; and most of them have let the duty of maintaining public standards sink somewhat into the background.

Less definitely perhaps, but still clearly, we see the same change of character in our colleges and secondary schools. In the place of a common course of study adapted to meet real or supposed public needs, we have witnessed the gradual development of elective courses intended to meet individual wishes at the moment or individual necessities for the future. We no longer lay our emphasis on developing that general attitude of mind toward intellectual questions which made the gentlemen or the scholars of the past. We are concerned rather with developing many kinds of education to suit the needs of many types of intellect and calling. The old-fashioned idea of scholarship as an end of secondary education has given place to the modern idea of science. Where the old-fashioned course made masters of arts, the modern course looks upon doctors of philosophy as its bright consummate flowers. We try to educate our college students as intellectual producers and not as intellectual consumers. I hold no brief for the old system. I shall not undertake to consider how far the great and unquestioned gain in private efficiency which has attended this change is offset by any loss in public advantage. It is sufficient to point out the difference of point of view which the change connotes, a difference which has manifested itself not in America alone, but in England and France and

Germany and in every country where the old traditions of university and college life are being modified under the influence of modern theory and practice.

At the beginning of the nineteenth century a boy's course of study in the high school or the college was not determined by his individual aptitudes; it was determined almost entirely by his social standing and social aspirations. If he belonged to the trading class, he received one sort of education; if he belonged to the military class, he received another sort; if he belonged to the professional class, he received a third sort. The collegiate education one hundred years ago was based chiefly upon the supposed needs of this professional class. Whether it was obtained in the *Lycée* of France or the gymnasium of Germany, the public school of England, or the college of America, it gave the student a large amount of training in Latin and Greek, a somewhat smaller amount of training in mathematics and moral science, and practically no training at all in modern languages or natural and physical science. Save for the fact that it involved a good deal of hard work and enabled the teacher to know whether the pupil was really doing his work or not, this course had little practical bearing on the needs of the individual. It served rather as an initiation into the learned society of which that individual was to be a member. It stamped the professional man, or the gentleman who expected to associate with professional men, as a scholar; as one who had gone through those distinctive rites which allowed a man to enter the mysterious portals of learning. The degrees or certificates which were obtained in the prosecution of this course of study were, as a French critic well says, social rather than pedagogical institutions.

To-day all this has changed. This change has gone further in America than in Germany, and further in Germany

than in England or France; but in every one of these countries, in greater or less degree, there has been an alteration in the underlying principle and object of college training. When class lines in business broke down, as they did at the close of the eighteenth century, it was no longer possible to maintain in their former rigidity class lines in matters of education. When careers were thrown open to ability instead of being determined by birth, each man was anxious to have the ability of his children developed instead of remaining content with those traditional studies which had once seemed a birthright and a class privilege. So long as one parent had to send his son to a college and another to a military school or else let them go altogether without education, each perforce took whatever the college or school chose to give. But as soon as he had the opportunity to select the kind of education which seemed best fitted for his son's needs, each group of schools was in a measure brought into competition with the others, and was compelled to arrange its course of study to meet the desires of the parents. We find in the progress of the nineteenth century a growing interaction and mutual influence exercised by schools and colleges of different classes upon one another. The German gymnasium and the German *Realschule* have not preserved the sharp distinctions which characterized them of old, but modifications and combinations have been introduced into their courses of study which make the line of demarcation between them gradual instead of sharp. The American college has borrowed so much from the American technical school, and the American technical school has borrowed so much from the American college, that it is impossible to say where one class of institutions ends and the other begins. In England and France the change has not gone so far, but there is quite sufficient evidence to show that the same tendency exists for

breaking down class lines and adapting college courses to individual needs. The time is past when a high school was but a high school, an academy an academy, a classical school a classical school. Almost every institution now has alternative courses of study, calculated to develop the powers of the individual pupil rather than to promote a common school life and school discipline.

Nor does this change stop short with college and high school. It makes itself felt in common school and in kindergarten. It transforms our whole understanding of the purpose of public education. In old days we taught reading and arithmetic because without reading and arithmetic the pupil could not perform his duties as a citizen. We taught obedience and respect for authority because we thought that obedience was a good habit, authority a good thing to recognize. Even in this free country of America we were content to teach pupils to spell in the accredited way, simply because it *was* the accredited way. To-day we have departed from all this. We have tried to see what the child wants or supposes it wants rather than what the community needs or supposes it needs. We have substituted nature study and observation for arithmetic and deportment. We have trained up a generation of children which has been brought in contact with many things, useful and otherwise, of which our children of previous ages never dreamed. But they have lost that respect for standards which is seen in accurate writing or ciphering. We need not go so far as did that pessimist who said reflectively, "School-children are not beaten so much as they were when I was a boy, but neither are they taught so much, so that what they gain at one end they lose at the other." But we may all express concerning modern school-children as a class that regret with which Artemus Ward qualified his otherwise favorable criticism of Chaucer: "Mr. C. had talent, but he could n't spell."

To-day more than ever we need to insist on the importance of this work of maintaining public standards, as compared with that of developing individual tastes and powers. This is especially true where schools are supported with public money instead of being maintained by the tuition-fee of the pupils. If a boy pays for his education, it is logical and right to give him the kind of education that he himself wants; but if the public pays for his education, it seems logical and right to give principal emphasis to the things the public wants. The public end of education is to teach the pupil to do his duty as a member of a free community. It is a purely private end to teach him to make as much as he can out of his fellow members in that community. If we use public money for private as distinct from public ends, we are adopting educational measures and principles which are socialistic in the bad sense; measures which use collective effort for the benefit of individuals instead of trying to enlist individual effort for the benefit of the community.

I do not wish to seem like a pessimist. That great good has resulted from our nineteenth-century emphasis on individual rights and individual activities in education I firmly believe. But I also believe that in the pursuit of this good we have lost sight of some other ends which past systems of education subserved; and that in trying to provide the rising generation with the fullest capacity for enjoyment we have fallen somewhat short of giving them that capacity for discipline on which the educational systems of earlier period laid too exclusive stress. It is an excellent thing to develop individual powers of work and means of happiness as fully as we can; but it is a bad thing to encourage the individual to think that his success and his happiness are the ultimate ends for which he is to work. We do not exactly teach this in so many words; but we

teach it in deeds whenever we make it a principle to regard the thing which is agreeable and playful to the pupil as presumably useful, and the thing which is disagreeable or fatiguing to the pupil as presumably useless.

We are not far enough away from the nineteenth century itself to get it into right historic perspective or judge how the good and the evil of its educational movements may balance. But I will venture the prediction that the educational principles and methods of the nineteenth century will have the same kind of fate which befell the political and economic principles of that century. The introduction of the idea of liberty in politics and in economics did great and overwhelming good. The Declaration of Independence, with its emphasis on man's rights where older documents had spoken exclusively of man's duties, with its assertion of the claim of liberty where others had spoken only of the claim of authority, and with its glorification of the pursuit of happiness where previous writers had preached nothing but self-subordination, marked the opening of a great era of political development and was the starting-point for the success and prosperity of almost every nation that adopted its principles. In like manner the publication of Adam Smith's *Wealth of Nations*, with its cardinal principle that self-interest in trade, instead of being wicked or obnoxious, might be made an unrivaled means of public service, marked the opening of a new era of industrial efficiency and physical welfare. But there came a point when people thought so much of their rights that they forgot the existence of such things as duty, a point when the pursuit of liberty resulted in anarchy, a point when men sought to obtain their own happiness at the sacrifice of the happiness of others. There came also a point when industrial self-interest could not be made a means to the public welfare, and when those who preached its universal beneficence found their previs-

ions unfulfilled. We have so many of these instances before our eyes that we no longer rely with the childlike optimism of our fathers on the universal beneficence of liberty in politics or in industry. We have learned that the ideals of the nineteenth century, though far better than those of the eighteenth, could not be regarded as goals of all effort or postulates of all thinking; that there was yet a word for the twentieth century to speak in a different sense from that of the nineteenth, and perhaps in a language different from that which those who had most to do in accomplishing nineteenth-century progress would have understood. So I believe it will be in matters of education. I believe that our present-day emphasis on the development of the individual represents an incident in educational progress rather than a fundamental principle which will underlie and control all the intellectual activity of the future. Without in the least detracting from the great and untold value of educational liberty, we may yet feel that the present moment is one for caution in applying this principle rather than for emphasizing its universal beneficence; and for laying our chief stress on the teaching of those ideas and methods, the training of those habits and emotions, which are essential to the well-being of the body politic.





# THE DEVELOPMENT OF EDUCATIONAL IDEAS IN THE NINETEENTH CENTURY

BY JOHN LANCASTER SPALDING

[JOHN LANCASTER SPALDING, Roman Catholic Bishop of Peoria since 1877, Peoria, Illinois. b. Lebanon, Kentucky, June 2, 1840. B.A. Mt. St. Mary's College, 1859; S.T.L. University of Louvain, 1864; LL.D. Columbia University; *ibid.* Western Reserve University. AUTHOR OF *Life of Archbishop Spalding*; *Essays and Reviews*; *Lectures and Discourses*; *Education and Higher Life*; *Means and Ends of Education*; *Opportunity*; *Religion and Agnosticism*; *Things of the Mind*; *God and the Soul*; and many noted works on religion.]

THE history of the education of a people or an age is the history of its civilization, of its intellectual, moral, and religious life, its material progress being incidental and subordinate.

Intelligence, virtue, and industry give man power over himself and all things; and it is education that makes him intelligent, virtuous, and industrious. The riches of nature and the wealth of human life are inexhaustible, but only those whom education stimulates to persevering self-activity make them their own. The controlling idea of the nineteenth century in philosophy and science is that of organic unity, implying a world-wide process of development. Hence the point of view is that of history. To understand what anything is, it is necessary to know how it has come to be what it is; for whatever exists is the outcome of an evolution which reaches back indefinitely to ultimate origins. To perceive all the facts in this process is to see things as they are. This principle is of universal validity, and its application to all the subjects and interests to which the mind can turn made possible the marvelous achievements of the last century, during which mankind grew in knowl-

edge and in power more than in the whole historic past. The secret and the law of progress had been discovered. Heaven and earth have become what they are. All things are interdependent, and God reveals himself as his work is unfolded in the mind of man and in nature.

In learning to know how things have become what they are, we have gained insight into methods by which they may be made better than they are. In our hands a key has been placed which opens doors that from the beginning had shut man out of Nature's most richly stored treasure-house. The subconscious efforts to advance, determined by the instinctive love of life, by a still increasing craving for the sensation of life, became, in the nineteenth century, the deliberate purpose, not of individuals merely, but of whole peoples. What the multitudes had for ages felt, they now became able to think. The self-activity which in earlier times had manifested itself in exceptional minds and in isolated groups now stirred the masses.

Education was seen to be a human need and a human right; the one means whereby a man, whether as an individual or as a citizen of an earthly or a heavenly kingdom, may fit himself to lead a noble and helpful life. It is, therefore, the need and the right not of a class nor of a sex, nor of a profession merely, but of all. Belief in the equality and kinship of men became a passion; and whatever laws or institutions are a denial of this faith were to be abrogated and abolished. Old things must pass away or re-live in the new spirit. It is the advent of the whole people, coming with mad riot and battle and celebrating its triumph in the glare of burning palaces, amidst the ruins of a falling world.

Universal education is a postulate of democracy which now first becomes self-conscious and understands that its rule is incompatible with privilege, slavery, and every kind

of oppression and injustice. The people are the whole mass of men and women and, if they are to rule, they must have the knowledge and wisdom which nothing but education can impart. As all have the same divine origin and end, all must be permitted to drink at the same eternal fountain-head of truth, goodness, and love. Hence it is the duty of individuals, families, states, and churches to bend their thoughts and energies to open ways and to provide opportunities for the education of all, that all may become intelligent, free, strong, and self-controlled. Social organizations are for the sake of men, and only the virtuous and enlightened can properly cherish and maintain the domestic, political, and religious institutions which consecrate and protect equal rights and liberties. The sense of the need of universal education was awakened by the growing consciousness that henceforth government was to be controlled more and more by the popular will, which, to be beneficent, must be enlightened. As the ideal of life became more comprehensive, the idea of education widened until it embraced the whole people and every interest. The aim is first of all practical,—the formation of individuals and citizens, whose character and intelligence shall fit them to do well, each in his own sphere, the thousand things which civil society implies and requires. But if education is to be made universal, it must be organized and supported by the state through a system of free schools brought within the reach of all, which it alone has the means to establish and maintain. The belief that education should be universal and the recognition of the fact that it can be made so only through a system of public schools, for which all are taxed, have given the impulse to the most characteristic developments of educational ideas during the nineteenth century. The ancient ideals of intellectual culture and moral discipline it did not transcend, but sought to give them general

application; and the success with which this has been accomplished is largely due to the influence which those ideals have exercised on the modern mind. What higher wisdom on this subject have we than Plato's when he says that the training which aims at the acquisition of wealth or bodily strength or mere cleverness, apart from intelligence and justice, is mean and illiberal and not worthy to be called education? But the pagan ideal was aristocratic; it was that of the freeborn dominating slaves, whose nature was supposed to be servile and incapable of true culture. It considered but a class and ignored humanity. Christ is the first humanitarian, and from Him and His followers the world has received its faith in the brotherhood of men and in the right of all to liberty and opportunity; and hence we call our civilization not Grecian or Roman, but Christian. It has sprung from the enthusiasm for humanity, the fire which Christ kindled, to burn the dividing and imprisoning walls, that all men and women might have unimpeded access to the truth and freedom which make right life possible. It is to Him, and not to the philosophers of Greece, nor to the calculating moralists of Rome, that we owe our faith in the Father in heaven and in the divine rights of man; His child, which is the master light of all our seeing, and the fundamental principle of our life, individual and social. This principle lies at the core of modern consciousness, even in the minds of those who doubt or deny; and from it our civilization, if it is to advance and endure, must develop, as of it belief in democracy and in the need of popular education is born.

The unprecedented expansion and diffusion of life and knowledge which took place in the last century are not a creation, but a development. That past still keeps us company, and what has been makes what is. He who first lit a fire, he who first used it to cook food or to render metal

malleable, made a forward step with which all the advancing races have kept and still keep pace. We do not owe to the nineteenth century the alphabet or Arabic numerals, or architecture or painting, or sculpture or music, or poetry or eloquence; we do not owe to it the mariner's compass or the telescope, or the Copernican astronomy or the printing-press, or gunpowder or the circumnavigation of the Cape of Good Hope, or the discovery of America or the steam-engine. We do not owe to it philosophy or science or true religion, or the doctrine of political liberty or of equal rights; nor do we owe to it the principles of the theory and practice of education. It was an era of culmination, in which the tree of life flowered and bore more bountiful fruit; but it could not have flourished at all had not its roots been struck deep into the soil of the past which the labors of countless generations had tilled and made fertile. It was an age of progress because there had been progress from the beginning.

It did not create the home or civil society, or the state, or the church, or the school, or any of the institutions that educate. It was an era in which mankind came to fuller self-consciousness, an era of more rapid expansion and diffusion of the powers which make for life, in which the passion for freedom and knowledge that is inborn found an environment exceptionally favorable to its exercise. Men became aware of the universal applicability of the forces they had inherited. They invented new and more perfect machinery, and by their aid attained a marvelous power, enabling them to fly rapidly over continents and oceans, to write their thoughts with a pen that reaches thousands of miles, to talk to one another despite forbidding space, to make the lightning illumine their homes and cities with a steady glow, the sun to impress the images of all things on solid matter, and types quickly to multiply the printed page in millions of copies.

It was an epoch in which the human mind applied itself with irresistible energy to the intelligible universe. Nothing escaped observation. It measured the velocity of light, it weighed the suns and determined the elements of which they are composed, it deciphered the story of the earth's evolution from a molten mass till it became the dwelling-place of man, it established the theory of organic evolution, the germ theory of the zymotic diseases, the molecular theory of gases, the theory of the conservation of energy and of the uniformity of nature. It was a century in which not single minds alone, but whole peoples, were stirred to a higher and more persistent self-activity. The marvelous advance in science, in the arts, in control over the forces of nature, enlarged the thoughts and aspirations of men, giving them a self-confidence which made them quick to believe and be certain that what had been achieved was but a token and promise of the infinite possibilities which the persistent intelligent efforts of multitudes striving for truth, liberty, and power should and would make real. Its victories were victories of mind over matter, triumphs of enlightened nations over the ignorant; and the whole course of events tended to confirm popular faith in the might and worth of education, which ceases to be the concern of scholars merely, and becomes the chief interest of governments and states. The democratic spirit, compelling faith in equal opportunities for all, brought about a general recognition of the truth that the first and greatest of opportunities is opportunity to educate one's self; that the most effectual help a man can render his fellows is to teach them to become intelligent, self-controlled, and self-sufficient. They are mockers who will talk of the brotherhood of men and yet consent that any should remain in ignorance. It is God's will that his children know and love, and they are not Christians who refuse to coöperate to

make his will prevail. The mightiest powers which manifest themselves in his universe are intellect and will, and it is a law that to act rightly they must be educated to act rightly. Work is a blessing, but to be condemned to work ignorantly and stupidly is misery and degradation. A man walks securely and does well only where the light of the mind shines along his path and if he walks by faith, he still walks in the light of the mind.

Imagination, which so largely controls human life, is a will o' the wisp unless it be illuminated and directed by the educated intellect. All genuine popular movements are inspired by sympathy, by a desire to go to the help of those who suffer, who are wronged, whose burdens are too heavy, to whom opportunity is denied. It is this that has provoked and sustained the revolutions which has liberated, which have given new hope and courage to the oppressed. It is this that impressed on the nineteenth century its most distinctive feature.

It was an era of emancipation, of enlargement of the life of the whole people. Faith in the worth of liberty, of equality of rights, of universal enlightenment, became a passion. New insight was gained into the truth that ignorance is slavery, and that where the masses are permitted to remain ignorant, tyranny and oppression are inevitable. Hence the faith in liberty and in equal rights grew to be an enthusiasm for the spread of knowledge. As the beneficence of science, its power to prevent or cure disease, to develop the treasures of nature, to minister to human needs in a thousand ways, became more and more manifest, public opinion turned with increasing force to the advocacy, establishment, and maintenance of systems of free schools in which the minds of all might be prepared to adjust themselves to an environment created by widening thought and more accurate knowledge. The recogni-

tion of the indispensable need and paramount worth of universal education led to a higher appreciation of the dignity of the teacher's office. He is no longer a pedagogue, but a coöperator with God for the regeneration of the world. Teaching evolves into a learned profession, is seen to be the supreme function of all learned professions through which, if it were rightly performed, there would be little litigation or disease or sin or ignorance. When men came to understand that the teacher is the school, their love for the school issued in respect and reverence for the teacher; and he who through the ages had been a slave, or treated as one, is now honored of all the wise and good. The best things—religion and culture, morality and art—are propagated, and they can be propagated only by those in whom they are a vital power. Hence the teacher should have a liberal education, should make his own the highest faith, the truest knowledge, the purest and most generous love that have thrilled a human brain and heart, and then acquaint himself with the theoretical and practical details of his work. The first requisite is to be a genuine, fair, brave, intelligent man or woman. It is his business to further life, to heighten its power and quality, and he can do this only when he himself is what he would help others become.

A message of the nineteenth to the twentieth century is this: "So mold public opinion that it shall lead the best men and women to choose teaching as a vocation." Let the buildings be full of light and pure air, let the classes be small, let the hours of study be few, let the pupils gain knowledge as industriously as bees gather honey. Let the atmosphere be that which only cheerful, strong, and loving souls can create. There is nothing beautiful or fair but the mind makes it so; and where there are luminous minds there will be willing hearts, there will be interest,



self-activity, and effort. The young grow stupid with the dull, tired with the weary, heedless with the indifferent. Their chief faculty is that of imitation and, if we would educate, we must place in the midst of them those into whose likeness they will find it a delight and a blessing to grow. There is not a pebble lying on unvisited shores but is held by indissoluble bonds to the universe of matter and of spirit too; and there is no subject so seemingly remote from human need but the right teacher will show it to be near and akin to us. He will take the empty forms of thought and fill them with truth as gracious as the presence of friends. To know how to interest is the teacher's great secret. It is an open one. If he himself is interesting, he will easily show that he is so, will hold his pupils to his words and to their work.

All our wisdom comes of experience, and our most fruitful experience is of noble personalities, whether in life or in literature; and since the end of education is the acquirement of wisdom, its method must be contact with teachers, acquaintance with whom is experience of virtue and culture as bodied forth in men and women we may rightly admire and love.

The most important development of educational thought in the nineteenth century was the fuller recognition of the principle that education is a universal right, that consequently it is the duty of society to provide the means of education for all, and that the one indispensable and sufficient means is the personal influence of enlightened and loving teachers. From this sprang the irresistible impulse to diffuse knowledge, to suffer none who might be taught to know, to live and die in ignorance; from this arose systems of free schools, made accessible to all; of this was born a truer appreciation of the worth of the teacher's office, an increasing desire to induce the ablest and the most sym-

pathetic to assume it, to procure for them the best culture, together with the discipline and training needed to give them tact and skill in the performance of their work. If the greatest minds of the nineteenth century gave most serious thought to the subject of education, considering it from the points of view of philosophy, of history, and of science, it was because the world had come to perceive that education, which is conscious evolution, is the method the Eternal employs to produce and perfect all that is brought forth in space and time. In developing whatever is potential in human endowment man coöperates with God to raise life to higher and higher efficiency and quality.

The value of all things was seen to lie in their power to educate, for mind is the creator of values. Strength is good only when it is controlled by the rational will; obedience is a virtue only when it is enlightened and free. The young are compelled to obey that they may learn that liberty is obedience to law. It is education that makes man strong and reasonable, obedient to law, which is the expression of the mind and authority of the Creator of all things. To assert that education is for freedom and not for authority is to wish to separate things which are inseparable. They who recognize not the authority of reason and conscience, and of the institutions in which they are embodied, live in worlds where there is no right or wrong, and are necessarily slaves. The more the subject of education was studied, the more all-inclusive it was seen to be. The evolution of the material universe had meaning, because it was the preparation of a dwelling-place wherein beings capable of knowledge and love might live and educate themselves. In this lies the significance of history, which is valuable chiefly as a record of the education of the human race. By this standard the worth of work, of religion, of science, of art, of literature, of political and civil institutions, is

measured. If criminals are to be reformed, if the blind and deaf and dumb are to be enabled to enter into intelligent communion with Nature and their fellows, if a more wholesome, rational, and moral life is to be fostered in communities and in individuals, the processes and methods of education give the surest hope of success. Faith in education is faith that reason and conscience are the mightiest forces; it is faith in God.

This deeper insight into the significance and value of education led not merely to its general diffusion throughout the civilized world, it led to more humane and just views in all that relates to the nurture and discipline of the young or to the improvement and correction of the unfortunate or perverse. Love guided by wisdom was perceived to be the supreme educational force.

Socrates has said: "We can teach only those who trust and love us;" and He who lifted the race of man to higher levels and diviner aims and hopes made love the test of discipleship. The only fear which is salutary is that which springs from love. To make the young unhappy is to arrest or pervert their spiritual growth. From the joys of childhood well the waters which make life's deserts bloom, which refresh and strengthen the heart in the midst of the trials and struggles that none can escape. The house which children approach unwillingly and with dread is neither a home nor a school. For the criminal even the chief hope is in the power of those to whom they are committed to inspire them with respect, admiration, and love. The glory of the nineteenth century was its greater capacity for sympathy with the poor, the wronged, and the disinherited; and if the history of the twentieth is to be a record of progress, it will be due to a still greater capacity for sympathy with those who need it most. The meaning and end of civilization is the conversion of Nature's struggle for existence

into man's coöperation for higher and holier life. Here, and not in devices, methods, and policies, we touch the fountain-head of educational wisdom and inspiration. Struggle is born of brutish instinct and appetite; coöperation, of reason and conscience; and the great aim of education is to establish the supremacy of reason and conscience over appetite and instinct. The domination of the animal in man had kept woman in subjection, had made her a slave, a drudge, or a plaything, but faith in education as a human need and right revealed to the nineteenth century the duty of providing for the education of women as of men. Opportunity should be given them to upbuild their being, to become all that their endowments permit, to do whatever thing is worth doing, to make of themselves not merely wives and mothers, but individual souls clothed with the liberty and the strength of the children of God. In nothing is the present age superior to all others more than in the intelligence and influence of its women; and this distinction it owes to its readiness to accept and apply educational truth in its fullness, not giving heed to those who doubt or deny or tremble for the safety of a world in which all women are invited to acquaint themselves with the best that is known and to take part in whatever concerns human welfare.

In developing educational ideas in the nineteenth century the Germans were the leaders, but the Americans were the first to perceive and welcome the truth that there cannot be an enlightened, free, and high-minded people where the women are not enlightened, free, and high-minded. We have accepted this as a principle, and our action has done more to further progress in education than all the speculations of all the philosophers. It is an implication of all our democratic faith. It is folly to imagine that the people will be wise and virtuous if the wives and mothers are not

wise and virtuous. The family is the true social unit. Upon it both the state and the church must rely for the inculcation and preservation of the truth which makes man social and religious. In the family the father is the head, the mother the heart; and great thoughts, true inspirations, and generous deeds spring from the heart. Shall we put our trust in the calculating intellect, and suffer the fountain-head of life's waters to be choked by noisome weeds?

If right education is a sovereign thing, its highest efficacy shall be shown in developing woman's power of love, sympathy, and self-devotion, giving her at the same time a wider outlook on the world of human achievement and a firmer grasp of intellectual truth.

In the nineteenth century the business of school-teaching was largely intrusted to women, and it was the willingness of the most intelligent to undertake this task that made the rapid spread of popular instruction possible. When it was found that as teachers women were the equals of men, it was not difficult to believe that they might compete with them in other fields of activity, and so it came to be understood that for woman, not less than for man, America means opportunity, inviting to larger, freer, and worthier life. She who had been the world's all-suffering drudge, who even as wife and mother had been held in subjection and denied the joys of awakened souls, stood forth self-conscious and thinking, to do her part to make truth and love, which is God's will, prevail.

In a century in which the mind and heart of the people had been more powerfully stirred by noble passions than ever before, progress was intensive as well as diffusive. While there was among the civilized portion of mankind a general advance toward greater liberty and intelligence, there was developed in exceptional minds an unquenchable thirst for knowledge. While for the multitude the means

of information were provided, the more serious and far-seeing spirits were busy seeking to throw a purer intellectual light on all the thoughts and ways of men. Standing on the vantage-ground prepared by the discoveries, inventions, and wisdom of the past, they moved forward, permitting nothing in the heavens or on the earth to escape their keen and inquiring gaze. Philosophy, religion, history, language, law, government, with whatever else may be the concern of man, were reëxamined and submitted to the test of the most searching criticism. Whatever the line of research, all felt that by increasing the store of knowledge they were enriching the race and creating opportunities for the progressive prevalence of mind over matter, of reason over instinct, and of free will over passion. At the bottom of all the feverish, persistent activity of the nineteenth century there lay a deep enthusiasm for human progress; a passionate belief that truer and wider knowledge cannot but lead to more intelligent, larger, and freer life; that it is the tendency not merely of vital religious truth, but of all truth, to emancipate. As the field of man's activity was made more fertile by more skillful culture and yielded more and more precious and abundant harvests, new hope of making the world glad, beautiful, and wholesome beyond the dream of past ages sprang within the heart. It was joy to be alive and bliss to be young. A spirit of optimism which refused to see, or at the least to be discouraged by the darker side of things, blew like a creative breath on the face of the people awakening to self-consciousness. The meaning of earthly existence seemed to grow deeper and more glorious. The past faded from view and the future glowed like the sky of dawn. The marvels of material progress became a symbol and a promise of a coming race illumined by science, strengthened by a higher faith, and purified by a diviner love. As everything was

investigated, the study of man could not be neglected. The light which science threw upon his physical constitution but made it plainer that his true being and world is the mind, that by the soul alone can he be great and free and strong. Hence thinkers were drawn to investigate the instrument of thought, to inquire into the nature of mind, to analyze its faculties, and to determine the order and method of their development. Anthropology became psychology, the practical value of which was found to consist in its application to pedagogy; and so the most subtle and the most energetic spirits were compelled by the intellectual evolution of the age to a more thorough study of the meaning and methods of education, which became a vital concern of philosophers, theologians, poets, statesmen, and philanthropists.

Pedagogy is not a science or an art which the nineteenth century created. The word is Greek, and the earliest thinkers understood that man's educability is his most characteristic distinction. Pedagogical problems preoccupied Socrates, Plato, Xenophon, Aristotle, Cicero, Seneca, Epictetus, Marcus Aurelius, Plutarch, and Quintilian. They received consideration from Gerson and Vives; from Erasmus, Montaigne, and Charron; from Descartes, Bacon, and Locke; from Comenius, Leibnitz, and Lessing; from Thomas Reid, Dugald Stewart, and Rousseau.

But in the nineteenth century education became a matter of social interest, engaging the thought of statesmen as well as the meditations of philosophers. Kant draws up a system of pedagogy, and when Germany lay prostrate beneath the victorious armies of Napoleon, Fichte proclaims in words of burning eloquence that, if it is to rise again, recourse must be had to a more genuine and thorough education of the people. From the enthusiasm and devotion of Pestalozzi modern popular education received a powerful

and enduring impulse. He breathed a new spirit into the school and enlarged its scope. He believed and made many believe that education is the chief means by which the masses may be redeemed from degradation, misery, and vice. He insisted that all should be educated; that the methods should be gentle and kindly; that the affection, the conscience, and the will need cultivation not less than the intellect; that the young should be taught not only to think but to do, and that the school should be a workshop as well as a classroom. He had a profound love for children, and held that to teach rightly one must have the mother heart. His aim was to educate for freedom; but he failed to see with sufficient clearness that liberty involves authority, though as men become more enlightened they grow more critical and appeal with increasing emphasis from authoritative organizations to the aboriginal seat of conscience in the individual soul. Hence the school, where the people are free and intelligent, strives to make its pupils self-reliant, self-controlled, and rationally obedient.

Herbart was influenced by Pestalozzi, and though his philosophy is unsound he applied psychology to the theory and practice of teaching with true insight. He made it plain that the mind does not gain strength and wisdom by seeing or perceiving, but by reacting on the impressions received through the senses, and by relating apparently separate objects to the whole of experience, until each is understood to be part of all, made what it is by causes that reach back to eternity, itself a cause whose effects shall in turn become causes in an unending process. This is Herbart's doctrine of apperception which the teacher cannot meditate too attentively. It is a process, not merely of identification or classification, but one in which the mind sees things becoming and follows them in an endless course of evolution,



until the interrelation of all things is perceived, and within and beyond all, the Supreme Spirit who makes, guides, controls, and harmonizes all. The teacher's effort must be to make his pupils understand rather than to see and remember.

Herbart's doctrine of interest and of educational values is suggestive and has compelled attention to questions which contributed to the development of educational ideas during the last century. Not less helpful in his recognition of moral life as the end of all education, and of the dependence of character on thoughts and dispositions which it should be the purpose of education to make habitual. Froebel's doctrine that education is conscious evolution, to promote which the whole environment, spiritual and physical, should be made to contribute, has had a wholesome influence on pedagogical thought. His kindergarten idea, however, while it springs from a real view, easily leads to the employment of methods which stimulate precociousness, make genuine work distasteful, and by confining the attention of children to the things immediately about them, enfeeble the imagination. There is also danger of impoverishing the sources of life by too early and too persistent appeals to self-consciousness.

The democratic movement which gave to the nineteenth century its most distinctive feature sprang from an increasing sense of the worth of the individual and led to more comprehensive notions of his rights and duties. Individualism in the matter of education found its completest expression in the writings of Goethe. Nature lays the foundation, and it is each one's duty to erect upon it the noblest possible structure.

Education is not merely or chiefly a scholastic affair, it is a life-work, to be carried on with unwearying patience until death bids us cease or introduces us into a world of

diviner opportunities. The wise and the good are they who grow old still learning many things, entering day by day into more vital communion with truth, beauty, and righteousness, gaining more and more complete initiation into the life of the purest, noblest, and strongest who have thought, loved, and accomplished. Self-education, as a life-duty, rests on the idea that personal worth is the measure of all values and the indispensable condition of genuine success; on the conviction that whatever a man may think or do or suffer is to be considered good or evil as it increases or diminishes his personal worth. It is indeed the ideal of philosophers and saints rather than that of men engaged in the ordinary business of the world. It may, nevertheless, and doubtless does help to raise the thoughts and aspirations of many above the ordinary demands of their occupations or professions, and so to stimulate them to strive not merely to gain a livelihood or a reputation, but to live in the mind, in the conscience, in the heart, and in the imagination. It may lead them to reflect on the common ways of men and to gain insight into the fact that their failure to continue to cultivate and improve themselves, when they have quit school, is due not so much to want of time and opportunity as to lack of will and energy. It is the result of the natural disinclination to make effort, to foster interest in knowledge and virtue simply because it is good to know and to be true and strong; of the tediousness of ceaselessly trying to surpass one's self, to know one's self, to refine taste, to purify affection, to control desire, to see things as they are, to judge not by opinion, but by evidence; to turn from present enjoyment in the hope of winning higher capacity to enjoy, to prefer the society of the immortal minds who live in books to games and gossip.

It is so much easier to run after pleasure, to labor to get riches or position than to devote one's self first to the up-

building of one's own being, not doubting but whatever else may be needful shall be had, that it is hardly to be expected that the ideal of culture and pure religion shall strongly appeal to the many. A man's real world, nevertheless, the world in which he lives nobly or miserably, is not that which lies round about him, but that which he creates and fashions within his soul. He may wear a beggar's rags, be a slave, an outcast, a prisoner, and yet, in virtue of the truth and love which are the substance of his being, excel in worth and dignity, as in the affection and reverence of the wisest and best, the favorites of fortune and the children of success; and it is this ideal that must be made to gleam along the path of the young, to throw its heavenly light about the home and the school, if there is hope for better things, if we are to have not merely improved machines, but godlike men and women. The individual is at once an end and a means. He exists first for God and himself and then for his fellow men, and he becomes valuable to the society by which he is so largely formed and fashioned in the degree in which he makes his own life complete and perfect. He is a whole and a part of the whole, and he must continue to improve himself, if he is rightly to perform his functions as a social being. This principle applies universally and determines the end and aim of all true education. It must underlie the theory of elective studies, or the result will be fragments of men; fine parts of men rather than great and noble personalities. The young will be encouraged to move along the lines of least resistance, and the heroic temper and the divine spirit which convert obstacles into opportunities will be wanting. They will become impatient and strenuous, eager and reckless, but they will not be made capable of knowing and loving the highest truth and beauty. We shall have experts, but no philosophers, poets, and saints. If the pur-

pose be to train for freedom, we must understand that they alone are freemen who free themselves from within; if for social efficiency, we must recognize that the vital, not the mechanical, individual is able to render the best service; if progress and the improvement of the race be the object, it is evident that success is to be hoped for from men rather than from measures.

The development of educational thought in the nineteenth century has made plain the absolute worth of the individual, and at the same time the vital union of the individual with the social organism, and his consequent duty to labor for the general welfare. It has also brought into fuller evidence the fundamental truth that human values are moral values, that character, which is the aim and end, is the result of right doing far more than of correct thinking. The world each one should labor to fashion within himself is primarily and essentially a world of righteousness. To educate, therefore, is not merely or chiefly to inform the mind; it is to strengthen, direct, and confirm the will; to foster habits of conduct, to fashion to the practice of virtue, to accustom the young to take delight in all that is good and beautiful, to feel the joy and happiness there is in overcoming passion and appetite, in triumphing over the inborn love of ease and idleness; to taste the sense of power there is in the play of the higher faculties, in the self-activity which illumines the mind, purifies the heart, and raises the imagination; to win them to believe and to know that the best and most useful things are not material but spiritual,—justice, honor, magnanimity, truthfulness, purity, gentleness, and love. Moral culture should dominate, direct, and control the whole process of education. Whatever the pupil does should make him wiser and better. His increasing knowledge should become the basis of larger and nobler life. Each new truth he comes

to understand should teach him respect for all truth. As he gains deeper insight into science, literature, and art his reverence and admiration for the mind of man should grow profounder and more real. The triumphs and sufferings of heroes and saints should give him higher aims and nobler ambitions.

Whatever, in a word, be the subject of his study, the end and result should be increase of moral worth, improvement of character. As he will make little progress unless he be a lover of knowledge, knowledge will render him poor service unless he be a lover of virtue.

But he cannot be a true lover of virtue unless he believes and feels that to be virtuous is the greatest possible good of man, whatever may be his temporal environment. "The end of a liberal education," says Plato, "should be to enchant the soul of children, while it is yet tender and innocent, with the frequent repetition of beautiful maxims. And to embrace them all in a single one, let us say to them that the life which is the most just is also the most happy in the judgment of God; and not only shall we speak truth, but what we say will enter more easily than aught else into the minds of those whom it is important that we should persuade."

"The insight," says Dr. Harris, "that God is a free person and essentially righteous and gracious is the arrival of man at absolute knowledge. For so soon as one discovers that absolute being must be self-active or personal and that to be absolute person it must be just and gracious, he has arrived at the highest possible insight—a knowing which must at the same time be true objectively."

Since ideas of education are ideas of life, they neither emerge nor become effective as isolated thoughts or fragmentary theories, but they spring from a world-view and are involved in philosophic systems which are spiritual or

material, theistic or pantheistic, Christian or pagan, secular or religious. Since education is for life, notions of life determine its processes and methods. What kind of man is the highest? What kind of effort is most worthy of encouragement? What is each one's first and most urgent business? Is the individual a means, or an end, or both? Shall the chief stress be laid on the present or on the future? Does man exist for this world alone or is it his duty to look beyond and labor to fit himself for the diviner existence to which faith, hope, and love point? Is the true ideal that of pleasure, or that of virtue and power? These are questions which whoever is interested in education must strive to answer if he wishes to go deeper than its devices and technicalities and to gain insight into the fundamental truth that human values are moral values, and that success or failure is not a matter of profit and loss, but of inner growth or decay.

The school is for the sake of a higher, richer, better life, for the sake of conduct, and conduct is inspired and nourished, not so much by knowledge as by feeling, by faith, and love, by the habitual contemplation and performance, not of what is pleasant or profitable, but of what is right and holy. Hence, if the school is to promote a higher life it must appeal to the consciousness of God's living, loving presence within the soul. It must enable the pupil to look beyond the brutal fact and present advantage to truth and final results, to project his efforts and longings into the future in which alone he can hope to make his ideal real. In all progressive movements man is impelled to lay stress not on what is, but on what ought and is to be. The future dominates the present, as the infinite the finite, the eternal the temporal; and the future for which we hope and strive, whether consciously or not, is not a condition of body, but a disposition of soul—the ideal being not abundance of

possessions, but a heavenly kingdom in which truth, justice, and love shall prevail; in which men shall be godlike, free, wise, and blessed. It is not economic and social, but spiritual and personal; not the complete exploitation and distribution of material things, but illumination of mind and elevation of soul. The supreme interests are those of the spirit, for the loss of which a universe of matter could not compensate. This is a fundamental principle of life and, therefore, of education. Could some mighty genius reduce all knowledge to a system and firmly grasp the whole, for him, as for the common man, the question of vital and infinite moment would still be matters of faith and hope, not of knowledge. The highest human good, therefore, is not intellectual but moral—a disposition of soul in which a divine faith and hope beget perfect love, manifesting itself in the fulfillment of righteousness.

It is the purpose of education to make able men, to develop capacity to see true and do right, to educe faculty from endowment, will from impulse, intelligence from instinct, but the ideal and end must be sought not in the doctrines of materialism, commercialism, or secularism, but in faith in God and in the absolute worth of life when illumined and controlled by the truth and love which are his being. In vain shall we seek to prepare a more and more favorable environment and to give opportunity to increasing numbers, if man himself be a creature of circumstance, an excrescence on a dead universe, a disease, a phantom, with nothing at the core of things to correspond with his highest thoughts and deepest yearning; if his end is as the end of a dream and all that made him is senseless and void. If the religious view of his life is not true, nothing is worth while, and whether he take for his guide utility or worldly wisdom or appetite, it matters little. Religious consciousness lies at the heart of all human con-

sciousness, and to it we owe the deepest insights and the divinest efforts of the race, as by it the evolution of civilization has been inspired and controlled. The predominant influences in history have been and are religious and economic, and whenever conflict has risen between economic welfare and that of loyalty to God and the soul, the highest, the noblest, and the mightiest have preferred truth and right to temporal success, and in doing so have become pioneers in the cause of freedom and progress. As it is a chief purpose of the school to acquaint the individual with the profoundest experience and the purest wisdom of the race, religion and the conduct it inspires must continue to be its central theme. The great human interests are maintained, protected, and furthered by institutions, by the family, the state, the church, and the school, and subordinate to these and in coöperation with them, by innumerable forms of association which the ever-increasing specialization of civilized life calls into existence. The home of the modern world is the outgrowth of Christian ideals and principles. It has been fashioned and safeguarded by the church, whose teachings establish its rights, its sacredness and its mission to form citizens capable of freedom and self devotion, who, while striving to build here a kingdom of heaven, live for a higher world which shall not pass away.

It is only in such homes that the true children of God are bred and reared; and they need to be reinforced by the school not less than by the state and the church. If the school ignore the principles which inform the home, the state, and the church, these institutions are undermined. As the modern state is conscious that without the school it cannot have intelligent, capable, and patriotic citizens, so the church in the modern age understands that it requires the coöperation of the school, if the spirit of religion, which is faith, reverence, obedience, self-sacrifice, purity, right-



eousness, and love, is to remain vital. As it is the tendency of the free school to weaken the sense of responsibility in parents, it is the tendency of the religiously neutral school to suffer faith, reverence, self-devotion, purity, and love to perish of atrophy; and a church which is severed from the school loses its influence on the home and ends by becoming a club for ethical culture or social advantage, as a state which is content to exist without and apart from the school condemns itself to weakness and inferiority. It would be as reasonable to maintain that the state has no need of the school as to hold that the church does not need the school. Without the assistance of the home and the school neither the state nor the church can prosper.

To a life of virtue, freedom, and progress the church is as indispensable as the state.

"The church," says Dr. Harris, "announces the divine plan of the universe, the fundamental ideal by which all things are to be understood, the final standard by which all things and events are to be measured. This is the most educative of all institutions, because the person who harbors a religious ideal puts himself into the process of applying its standard to every experience of life."

This standard must be applied to the school, which furnishes to all who pass through it an experience that shapes and colors the subsequent course of their lives. The Christian religion is education,—the deepest and most far-reaching educational force in the world,—the power which more than all else originates and sustains the impulse to conduct, which is three-fourths of life. "The first condition of responsiveness to religious influence," says Professor Peabody, "is the recognition that in their fundamental method and final aim, religion and education are essentially consistent, coördinate, mutually confirmatory, fundamentally one." If education means, as President Butler affirms it does, a

gradual adjustment to the spiritual possessions of the race, is there doubt that the wealth of truth and love revealed in Christ is the most precious and the most vital of these possessions? Does He not furnish the highest incentive and the most effective aid to all who would grow into completeness of life, into the perfect image of God? If intimate acquaintance with the noblest who have lived, with their spirit and work, be a chief aim of education, shall we exclude Him who more than all heroes, philosophers, and poets has stirred the minds, raised the thoughts, and purified the affections of mankind? If in our democratic world all the institutions that educate are impelled by the force of public opinion to train to social service, to emphasize the truth that no one can be wise or good or great or happy for himself but only in loving, helpful association with his fellows, where shall we find an example so high or an incentive so strong as in the life of Him who came not to be ministered to but to serve; who made the love of others the test and proof of spiritual kinship with himself? If our sympathy for children, for the multitudes who are still condemned to drudgery, to sacrifice the sweetness and joy of life that the few may be surfeited with luxuries, is genuine, how is it possible that in the formative and decisive period of human existence we should deliberately shut them out, in any of the processes of education, from the mind and heart of Him who is the world's great lover of children and of the poor?

Shall we in our schools set aside days to commemorate some mediocre patriot, poet, or orator, and make it an offense there to do homage to Him who has given His name to our civilization, who has uplifted morality with an unexampled splendor, who has inspired a sympathy and love for man which has transformed the life of the race, who has made childhood sacred, and raised woman to a throne

whereon the noblest must forever do her reverence, in whom greatness of thought was wedded to greatness of soul in a supreme degree, who in Himself more than in the doctrines He teaches is truth and goodness and beauty?

Education is the soul's response to God's appeal to make itself like unto Him, self-active, knowing, wise, strong, loving, and fair; and the permanent example of the most complete hearkening to this appeal is the life and teaching of Christ. He moves on the plane on which the lot of the lowliest is cast, and He lives on heights to which saints and philosophers can attain but at momentary intervals.

The infinite power of the brave and the good to dare and to suffer reveals God to us more than the unimaginable force and splendor of millions of suns; it manifests to us that the spirit of man is of higher quality and greater worth than a universe of atoms. It is forgetfulness of this that makes us victims of schemes and devices, gliders over the surfaces of things, incapable of thinking or loving or doing what has everlasting value, become as traders for whom the market fixes the standard of worth, for which success is more than the soul, who lack the spiritual mind which is the highest educational force and influence. Teachers who fail to see all things in the light of eternity and in the omnipresence of God are but servants of idols. They drift toward mechanical methods, appeal chiefly to the arithmetical and calculating understanding, leaving the faculty for divine thoughts and infinite hopes to perish of atrophy. They form tradesmen, artisans, schemers, and politicians, not men who live in the inner sanctuary of conscience and draw sustenance from the eternal unseen world of truth and love, where commercial standards have no significance or application.

To educate is to labor for the greatest happiness of each and of all in the sense in which happiness is indistinguish-

able from wisdom, holiness, and love. It is to accustom to think, to meditate, to give heed to the voice of reason and conscience, to withdraw from the noise of life and the tumult of passion, that this voice may be heard in all its depth and purity. It is to store the mind with true principles of conduct and to create habits of right thought and action. It is first of all a work of religion and morality, of intelligence and wisdom, of sympathy and love.

The ideal of utility certainly is applicable to human life in a thousand beneficent ways, and may illumine the path of the noblest. It adds a general principle to knowledge and is of advantage to the whole world. But it is only an aspect of the truth. All things exist for those who know how to make use of them, and their true and highest use is to minister not to appetite but to reason, not to instinct but to conscience, to the human, not to the animal. Right is higher than might, goodness than success, love than lust. There is no more doubt that falsehood, dishonesty, and impurity are wrong than that bodies are controlled by the law of gravitation, or that moral truth is of infinitely greater import to the spirit which is a man's self than is the physical fact. No one really believes that a bad man can be happy here or hereafter, and the higher our view of life the less we think of our pleasures and interests.

It is only when he walks in the light of this ideal that the teacher is uplifted by a profound and abiding enthusiasm for his work, which he feels to be a coöperation with God for the salvation of men. The greatest of educational problems is how to induce the best men and women to make teaching their life-calling; and it is the most difficult.

If considered merely as a career many more inviting ways open before the eager eyes of the young who have brave hearts and lofty aims. For the most part the teacher's task begins and ends with drudgery. It is monotonous,

wearisome, ungrateful, and obscure. He must himself create the taste and the ability in those he instructs to appreciate the good he does them; and when appreciation comes it is like hope deferred. He is tired and outworn and no longer cares. His very soul has become subdued to the crude brains he has so long labored to suffuse with light and to open to all the glories of heaven and earth. How shall he persevere, how shall he become daily self-surpassed, how shall he retain the freshness and elasticity of youth in the dull air and routine of the schoolroom? Will it be possible for him to keep alive faith in the potency and beneficence of education? Will not the power to vivify, to create life under the ribs of death, depart from him, and be degraded to the function of an attendant upon a machine?

Surely this will be the result if freedom of the soul is denied to him, if he is forbidden to impart the fruits of his holiest and most helpful experience, the thoughts he most loves, the hopes he most cherishes, the very life which is his strength and joy.

The great educators have not striven to make earth a lubberland, but to found here a kingdom of heaven wherein truth, justice, and love should prevail; wherein men should do the will of God, as in unseen worlds it is done by higher beings unhindered and untempted by human weaknesses and passions. They are the world's guides, the saviors, the inspirers of the multitude the leaders out of captivity and bondage.

An infinite hope has descended upon the world, undreamed of by the philosophy of Greece, and like the memory of most blessed days, or like remorse, it cannot die. Individuals may become atheists and materialists, but the mind and heart of Christendom can never abandon faith in God who knows and loves and is good, and in the immortal soul of man. The wisest and the best will not cease to

yearn and to labor for the coming of His kingdom on earth. In the growth of science, in the spread of knowledge, in the increase of liberty and opportunity they will see the fuller manifestation of the divine purpose. But as the life of the individual would be empty and meaningless if this world were all, so the race itself becomes insignificant, if beginning on a cooling spall it is to be extinguished utterly on a frozen rock. It is in the power of individuals, and of classes of people even, to smother the soul in sensual indulgence, or to stifle the voice of conscience in the mad struggle for gain, but the summit on which Christ lived and died and re-lived, once having been attained, mankind can never again in contentment and tranquillity satisfy themselves with lower things. This faith lies at the root of modern civilization. It is the vital principle of the Christian home and the Christian church; and if the state and the school organize themselves on a purely secular or utilitarian basis, our social and political life will undergo a radical change. We may increase our commercial efficiency; may so manipulate the natural resources of our continent that the markets of the world shall pay tribute to us; we may heighten the level of intelligence and raise the standard of living for the multitude, but little by little we shall lose the power to believe in the absolute worth of truth and goodness and beauty, of justice and purity and love. We shall become the richest of nations, but shall have no supreme men and women. The poet's vision, the saint's rapture, and the patriot's lofty mind shall be made impossible. Existence will cease for us to have a spiritual content, and we shall come to hold that a man's life consists in the abundance of the things he possesses, and not in the faith, hope, and righteousness which make him a child of God and a dweller in eternal worlds.

# THE SCHOOL IN ITS RELATION TO SOCIAL ORGANIZATION AND TO NATIONAL LIFE

BY MICHAEL ERNEST SADLER

[MICHAEL ERNEST SADLER, Professor of the History and Administration of Education, Victoria University of Manchester. b. Barnsley, Yorkshire, England, 1861. M.A. Oxford (Trinity College and Christ Church); Post-Graduate, University of Jena, 1895; LL.D. Columbia University. Officier de l'Instruction Publique; Secretary of the Oxford University Extension Delegacy, 1885-95; Student and Steward of Christ Church, Oxford, 1886-95; Director of Special Inquiries and Reports to the Board of Education for England and Wales, 1895-1904. AUTHOR OF special reports on educational subjects; reports on secondary and higher education.]

## I

WERE it possible for some eighteenth-century observer of men and manners—say, for Addison or Bishop Butler or Dr. Johnson—to return to life in order to study the educational principles and practice of the more democratic communities of the present day, he would probably dwell on six things as being (apart from those changes in courses of instruction which are due to the progress of physical and historical science) the most conspicuous points of difference between the old order as he knew it and that which now prevails. He would note, first of all, that the public schools open up for the children of the masses of the people a range of individual opportunity which in extent and in stimulating variety goes beyond any precedent in history. Secondly, he would observe, with surprise though not necessarily with approval, that school discipline, especially on its physical side, has lost its former severity of application. Thirdly, he would stand amazed at the effective recognition which has been given to the claims of women to intellectual self-development. Fourthly, he would find, in all grades

of education from the kindergarten to the university, the teacher's calling regarded with greatly increased honor and consideration. Fifthly, he would be impressed by the successful assertion by the secular state of the right to impress an ideal of life upon the consciousness of the rising generation. And sixthly, he would justly conclude from the amount of our educational discussion and from the scale of public educational expenditure that the present generation attaches to the school, as a factor in social culture, an importance which was foreign to the habitual thought of his own time.

In bringing about this great change of opinion four nations have borne an especially brilliant part—France, Germany, Switzerland, and the United States of America. Without Rousseau and the ethical and social ferment of the Revolution; without Kant, Fichte, and Humboldt, not to speak of Froebel and of Herbart; without the genius of Pestalozzi and his self-sacrifice at Stanz; without the high Puritan tradition of New England; without the illumination of Franklin's common sense; without the logical audacity of Jefferson; without Washington's measured warning; without Horace Mann's missionary enthusiasm; without Emerson's profound insight into the deeper obligations of democracy, the world would have won its way far more slowly to the modern conception of the public school. The value of these confluent forces and the subtle outcome of their interaction upon one another impress themselves upon the mind of the student of the history of educational ideals, and of the struggle of those ideals to get themselves realized in institutional life and in public administration. Not least is this so when the work of the student lies, as does my own, in a country which is under heavy obligation alike to French, to German, to Swiss, and to American educational effort, and which nevertheless has



found in no one of them singly the precise formula of a remedy for its own special educational needs.

Is there not often a delusive simplicity in too highly generalized discussions of the worth of the elementary school? The elementary-school problem in the modern state is not one problem, but a conglomerate of problems. May we not say that educational progress will lie in the direction of differentiation of schools with definite regard to different types of future calling in the body politic, and to different kinds of social need, rather than in the assimilation of all the public elementary schools in a community to one general form, whether in respect to discipline (some schools need a stricter discipline than others), to balance of studies or to internal organization? Differentiation of schools within a general framework of administration unity seems necessary if the elementary schools are to grapple with the complex needs of modern and especially with those of city communities. (This view is confirmed by the fact that in the sphere of high-school education there is a similar tendency towards differentiation of aims.)

Another obstacle to educational progress has lain in the too common habit of regarding the school as if it were almost an end in itself, and in artificially separating our study of the specifically school problems from the study of the other sociological and economic questions which are in fact intimately connected with it.

The study of educational science stands in very close relationship to sociology, to biology, to physiology, to the science of public health, to economics, and to politics, as well as to psychology, ethics, and religion. Nor can it dispense with the aid of political and economic history as throwing light upon the course of the development of various forms of corporate life, while the comparative study of racial characteristics is needed in order to a judgment

concerning the type of education which is likely to be more appropriate to the particular group or people under review.

But school problems have been too rarely regarded in relation to their social context. Different branches of social effort and of social administration have been kept too often in an unfruitful and unscientific separation from one another. There has been a false kind of specialization of thought and of practical treatment in the common handling of school problems. Too little synthetic thought has been devoted to the relationship between specifically school problems and the general social welfare of the community, including the life-needs, other than individualistically economic, of the different categories of pupils in the schools. The result is that in educational investigation we have failed to make the most profitable use of much already accessible social experience, and many workers in other parts of the sociological field have, in their turn, omitted to give the necessary special study to the technical problems of the school. There has been too much indiscriminating generalization and too little scientifically planned analysis of the diverse problems which lie concealed under the apparent unity of the elementary-school question. Specialization within arbitrary limits has defeated its own object and has held us back from the course of conjoint investigation over the whole field of action which must precede successful synthesis and which alone can lead us to the attainment of more precise social aims in administrative and educational reform. Happily, there is now noticeable all over the world a distinct movement towards less separatism in our treatment of the school problem. We observe everywhere, and not least in America, an effort in the direction of more synthetic inquiry into the relationship between school work and other departments of social activity. But so little has yet been done to bring our knowledge of educational history into

its true relation to the history of economic and social development, and we are still so far from having brought into the common stock our educational experience and observations and the experience and observations gained in other departments of sociological inquiry, that we are not yet in possession of the materials upon which alone we could venture to build up a consistent and accurately classified theory of educational aims and practice, adjusted to the diverse and perplexing needs of modern life. Hence it is prudent to regard much of our present practice as provisional and as likely to require considerable revision when more has been done to coördinate the experience already gained in our own and other related branches of social effort, and when the time has come to draw confident conclusions from a wide range of skillfully planned educational experiments.

From this point of view, the highest significance of the current modern conception of the public school seems to lie less in what it has already achieved, great though that achievement has been, than in the certainty of the further changes to which it promises to lead. In few parts of the field of social regulation must the student-administrator feel himself further from his final conclusions than in the matter of public education. The subject of his study is vast, iridescent with incessant change, and still largely unexplored. Some of the factors are hidden in their operation, elusive of exact analysis, and necessarily slow in producing their effects. The sciences from which he must derive some of his guiding principles are themselves germinating afresh. Moreover, education, in any full sense of the word, involves a social ideal. It postulates a stable social structure. It operates through a variety of influences, only some of which are, or can be, concentrated in the work of the school. But at the present time we are but feeling our

way toward some firmer and less fluctuating form of social organization. It is impossible to predict the outcome of the stupendous forces, economic and emotional, which are now stirring the world to its depths. Educational organization follows great intellectual and social movements after an interval, and attempts to carry out their main idea. It was so at the time of the Renaissance and at the Reformation. At the present time educational thought faithfully reflects the welter of conflicting ideas in which we live.

During the past half century the most characteristic achievement of the public elementary school, in its best democratic form, has been its work of social liberation and of social encouragement. It has opened new avenues of hope, new opportunities of self-realization. Its economic service to the world, at a period when individual buoyancy and initiative were especially needed, has been immense.

But still greater has been its service in stimulating a belief in ideals among great multitudes of people, who would otherwise have been in grave danger of falling into a state of intellectual indifference bordering upon materialism. At a period of rapid intellectual and social transition it has furnished new motives of action, new hopes for the future. It has helped forward those who were economically and morally strong enough to avail themselves of the new opportunities to which it opened the door. It has scoured away many prejudices and obsolete distinctions. It has cleared the ground for new foundations. But its work has been least successful among the morally weak and among those lacking vigor of personal initiative. Its influence has been first assimilative and then selective, but not in the highest sense socially coördinating. It has drawn forth from the masses the most vigorous individuals and given them an entirely new start toward personal independence and prosperity. But it has left a great residuum, and for the educa-

tional treatment of that residual social deposit it seems desirable that measures should be taken very different from those which have proved themselves appropriate to the needs of the more vigorous. In dealing with the residual deposit which consists of the physically or mentally deteriorate, the time seems to have come, especially in the great centres of population, for a more deliberate or far-reaching attempt to reconstruct for them a new social order upon the basis of a more scientific organization and of a more provident discipline planned in the interests of collective, or at least of corporate, well-being. In our educational policy we seem to have reached the point at which it is necessary to discriminate between the needs of the vigorous and of the deteriorate. For the former it is sufficient and prudent to provide an educational system which postulates a good home environment, adequate nutrition, and a healthy physique, and which, therefore, relies with confidence upon methods which stimulate individuality and open the windows of new and varied opportunity. But for the residuum of deteriorates a very different and more comprehensive course of treatment seems necessary.

One danger of the situation is lest there should now begin in some countries a too sweeping reaction against the individualizing tendency of the best democratic elementary education and lest, with the needs of the deteriorates too exclusively in their mind, some administrators should attempt to curtail the freedom and intellectual activities of the elementary schools as a whole (eminently well suited as they are to help forward those children who are fitted by natural endowment and other circumstances to take advantage of them), in order to impress upon the whole elementary-school system a form more appropriate to the needs of the physically and intellectually deteriorate. This danger is increased by the fact that many earnest social workers have,

in the nature of things, been absorbed in their labors among the deteriorates, and have been impressed by the frequent failure of the present school system to supply the kind of moral and physical discipline which the deteriorates require. Such workers, while speaking with just authority about the needs of that section of the population with which their labors have been concerned, have often had comparatively little time to observe with equal thoroughness the very different effects of the schools upon the numerically larger aggregate of vigorous children and families. Hence it is possible that some devoted and high-minded philanthropists might, with the best intentions, favor a change in educational policy which would be hurtful to the interests of the community as a whole, though well calculated to supply a more formative discipline for the physically and intellectually deteriorate. Is there not need for the most careful discrimination between the educational needs of different classes of the community, which are sometimes spoken of too much in the lump? Equally careful should be the discrimination exercised in judging the different educational needs of members of the same family. It is perilous to allow a great mass of deteriorates to form itself in our modern cities, but in the long run it would be far more perilous to deprive the whole elementary-school system of its strong individualizing power. Let us deal with the deteriorates as a problem which, though appalling in its magnitude, is nevertheless the problem of a minority. For the non-deteriorate that system of public elementary education will, in the long run, continue to produce the best results, which stimulates individuality and which, while laying great stress upon the inculcation of social duty, relies in the last resort upon the moral and intellectual vigor of the child itself. The highest aim of a great system of popular education is not to mold multitudes of men to one pattern. Its ideal



## ABELARD AND HIS SCHOOL

*Hand-painted Photogravure from the Painting by F. Flameng*

Abelard, the famous French scholar, was born at Palais, near Nantes, in 1079. He became so celebrated for his learning and genius that he was induced to open a school in Paris in 1103, where he lectured on Philosophy, Theology and Logic with great success. He was the first who applied philosophical criticism to theology. His romantic love affair with Heloise has contributed largely, however, in making his name famous in modern literature. Abelard died under charge of heresy in 1142, and was buried in the Paraclete, which he had made a convent with Heloise as the Abbess. Heloise survived till 1164, and was also laid to rest in the Paraclete. In 1817 the ashes of Abelard and Heloise were removed to the cemetery of Père la Chaise.







is not blind submission to rules imposed from without, but willing and intelligent obedience to a noble and self-chosen way of human life. From this point of view an ideal of educational uniformity, in any stratum of national instruction, is (I would submit) a wrong ideal, whether it be set up by an ecclesiastical organization or by the secular state. Within the broad framework of allegiance to the state we need abundant variety of educational tradition and experiment. The chief task of the school is, surely, to bring about, through the quickening of individual powers, a greater readiness to give each his best to the common good, and yet so to shape for each the ideal of public welfare as to enhance men's reverence for the rights of the individual conscience and to give them a clearer understanding of the worth of sturdy personal character, of stability of moral principle, and of brave initiative. From this point of view the course of training which popular education should endeavor to provide is one which would jealously guard the exercise of the individual judgment without which no real progress is permanently possible, while at the same time insisting on due obedience to the teacher's authority and fostering a desire to subordinate selfish aims to public interests and to corporate needs. All true education is thus a combination of opposites. It seeks neither to absorb men's minds in mundane or material things, nor yet shut them out from bearing a vigorous part in the practical activities of the modern world. It would teach men to be true to both sides of the truth. If it fosters an untempered and arrogant individualism, it is false to its trust, but not less false if, rushing to the other extreme, it were to seek to inculcate passive obedience to some social or intellectual theory, imposed dogmatically by rulers who, however scientific, yet denied the right of criticism, of protest, and of practical dissent.

## II

The enormous difficulty of accomplishing this educational task in the circumstances in which the work has to be done, and with the instruments available for the purpose, must fill every student of the subject with some misgiving and concern. Nor is the difficulty materially lessened when we take into account the fact that all that the school in its specific sense can at best be expected to accomplish is to set its pupils on the road to getting for themselves intellectual and moral benefit from the much longer course of education which awaits them, when school days are over, in the real tasks of life. Yet at the very time when the student of education has come to realize more vividly than ever before the intricacy and incalculable difficulty of the higher work of the school, the great mass of every free people is evincing to a degree hitherto unparalleled its belief in the value of popular education and its readiness to make large sacrifices for its extension and improvement. Such confidence as this has not been lightly won. That it should be thus displayed with evident sincerity, and on so vast a scale, is in itself a proof that popular education has already achieved a colossal work. At a period of unexampled economic development it has furnished to the strong and energetic (to take the matter as it should be taken, at its best) with a keener perception of personal opportunity, with some of the means of seizing those opportunities, and (what is of high economic and often of moral worth) with self-confidence and bright hopes for the future. To have done this, at such a crisis and on so vast a scale, is an epoch-making work and one of which the benefits far transcend the accompanying disadvantages. To many thousand humble homes on either side of the Atlantic there has come after long and bitter discouragement a ray of bright hope from the American public school.

But this quickening sense of new economic opportunity does not alone explain the modern belief in the virtues of public education freely open to the masses of the people. Does there not also lie behind that belief a more subtle cause? Shall we be wrong in tracing it back in part to something not less fundamental than eagerness for new economic opportunities, namely, to an instinctive sense of need of something which may fill the place of those traditional and less conscious processes of social education now in swift decay? The critical movement in thought and the revolution in economic processes have profoundly shaken the old order of ideas, and with them the various established traditions of social conduct which in considerable measure rested upon them and had grown out of them. To the great majority of human beings the firmest kind of education is that which results from the impalpable but steady influence of a stable social environment. The silent pressure of such an environment molds the thoughts, directs the sympathies, shapes the purpose, upholds the will, and fixes the way of life. Such an environment embodies a long tradition. It is venerable with precedent and tough with habit. At its best it is consecrated by a thousand pictures, and means brotherhood, loyalty to a beloved tradition, and memories hallowed by death. But much of this educational inheritance the stress and changes of our modern life have weathered away. The disappearance of the old order in its thousand different forms and implications was inevitable. Often its disappearance was a boon, but sometimes an incalculable loss. And much of the great development of popular education from the time of Pestalozzi onwards has been due to an effort, often conscious, sometimes instinctive, to repair, if it be possible, this loss of the old upholding environment by the more deliberate efforts of the school. The relative importance of the school has

grown through the decay of other forms of virtually educational tradition. If the aim of education is to prepare a child for the life which he will have to live, increase of schools does not necessarily mean a proportionate increase of real education. What existed before may have been in a true sense education, though less intellectual in form and less organized in its presentation.

### III

If we examine the great educational traditions or school systems of the medieval and modern world, we find that they fall into six main groups according to their dominant purpose.

(1) The chief design of some of them has been to initiate their pupils into the manners, the tone of thought, and the point of view, as well as into the necessary accomplishments, of some fairly well-defined class or profession. Such, for example, was the business of the knightly education of the Middle Ages. Such, again, was the aim of Madame de Maintenon's school at St. Cyr, and a similar, though not precisely formulated purpose has influenced the educational tradition of great schools like Eton. (2) A second group is formed by those schools which were intended to maintain the tenets and the intellectual presuppositions of some great section of the community. Such, for example, were the schools founded under the influence of Luther and Melancthon, the schools of the Jesuits, Calvin's school at Geneva, Sturm's at Strasburg, the schools of the Puritans in Massachusetts and Connecticut, and the Nonconformist academies in England. Such, too, are the schools under the control of the Holy Synod in Russia. Such school systems are, in the nature of things, rarely coterminous with the whole area of national life. In some cases the range of this influence extends over parts of more

nations than one. (3) A third group has had for the dominant purpose the training of competent recruits for the service of church or state, whether as administrators, secretaries, officials, diplomatists, or members of the clerical and other learned professions. When church and state have been in close alliance, this group has been virtually identical with that just mentioned. This training of competent recruits for the church or public service was the aim of the clerkly education of the Middle Ages—the educational ladder up which climbed so many brilliant boys of humble birth. This was William of Wykeham's intention when, after the depletion of the ranks of the English clergy by the Black Death, he founded St. Mary's College at Winchester. Such was the far-seeing purpose of the makers of New England in their policy with regard to secondary and higher education, and such, too, was, in great measure, the motive for the reorganization, under the influence of Humboldt and his successors, of the higher schools which have ever since been one of the institutional glories of Germany. (4) A fourth group of school systems has aimed at what may be called rescue-work, at saving the neglected classes from moral and educational destitution. Such was the intention of the schools for poor children, instituted by Catholic piety in France in the seventeenth century; and of the schools of industry established by benevolent social reformers in England during the reign of Queen Anne, a movement which drew part of its inspiration from the work of Francke at Halle. Such, too, was the first aim of Pestalozzi and the purpose of the most distinguished supporters of Lancaster and of Bell in England in the early years of the nineteenth century. (5) The dominant aim of a fifth group has been the opening up of new social and economical opportunities for the children of all classes, in the belief that it is to the interest of the whole community to

multiply opportunities of self-advancement for strenuous individuals possessing intellectual grit and persistence of purpose. This has been the most characteristic note of the democratic educational movement which draws its philosophy and inspiration from the more individualistic theories of the eighteenth and nineteenth centuries. (6) The sixth group aims more definitely at the consolidation of the national life by impregnating the masses with national feelings. Such, rather than the more individualistic aim, was advocated by Mazzini, and such has been the chief purpose of those who have developed the state primary school system in France under the Third Republic. In more than one country at the present time we can watch, within the compass of what is technically a single school system, a conflict between the dominantly individualistic and the dominantly nationalizing aim.

Now may we not say that each of these six motives may reasonably be expected to persist, though with different degrees of intensity, according to circumstances, throughout the course of educational development of a great people? Is it not expedient to take account of each of them and, with due guarantees for national unity, to permit each of them to have its influence and to find its characteristic expression?

As against this view and its administrative implications, it may be urged that the essential thing is to secure at any cost national unity of means as a practically homogeneous school system. But, while fully admitting the indispensable importance of national unity, I would raise the doubt whether after all national unity in any true and permanent sense is to be secured by the elimination of differences in the educational traditions through which the rising generation is permitted to pass. National unity is the outcome of a complex variety of causes and is not the mechanical



outcome of a school system. To believe that school-teaching by itself can secure it is an exaggeration of the actual power of the school. To eliminate, in pursuance of such a belief, fruitful varieties of school tradition seems likely to cause an educational injury which would far exceed any benefit that might reasonably be expected to follow from the administrative convenience of greater uniformity.

The ground upon which I would chiefly support this view (and in advancing it I readily admit that in certain circumstances it may be necessary to suspend educational freedom as an act of political necessity) is that in the case of great numbers of children the moralizing, character-forming, and socializing influences of a school are most effective in their operation when the school is intimately associated with the life and tradition of some homogeneous social group. As illustrations of this point I would cite the Little Schools of Port Royal, and the schools connected with the Society of Friends. It seems to me to be the true interest of the nation to recognize the educational possibilities of these various group-connections, and instead of attempting to give an educational monopoly to a uniform system of state institutions, to permit a part of the work of national education to be done through different social groups, provided that the efficiency of their work is periodically tested by methods of inspection approved by the state. In some cases the municipality or township would form such a group. In other cases the unit would be a group of families or of individuals, voluntarily united on a basis of intellectual or religious agreement.

#### IV

By way of practical comment upon some of the points submitted for your consideration in this paper I will venture to conclude with a brief reference to the present edu-

cational situation in England. At no earlier time in her history has England been so deeply stirred on the subject of national education as she is to-day. No one can yet foresee the final outcome of the movement which is now in progress; but it is already clear that in future the organized work of the school will play a much more important part in English life than, in spite of the immense advances which have been made since the passing of Mr. Forster's Act in 1870, has yet been the case. There is a wide-spread conviction that greater efficiency in the intellectual side of school training is vitally important to the civic well-being of the nation as well as to its industrial and commercial interests. The history of popular education in England has been at bottom (class selfishness and ecclesiastical prejudice apart) the history of a conflict between two ideals, the ideal of the education of the people mainly through a public school system, and the ideal of education mainly through the influences of an established social environment and through the faithful discharge of appointed duties in life; or in other words, the ideal of education mainly through free scholastic opportunity and the ideal of education mainly through social discipline. Each ideal had its share of truth. But the one side believed that the school could do more than schools alone can ever do. The other side greatly underrated the service which efficient schools can render to a nation, and at the same time failed to see how far the actual social environment was from furnishing the kind of training which their argument presupposed. But the new trend of educational thought is bringing these two ideals into union. The conception of the school organized in close relationship to an improved social environment combines the thoughts for which each side contended. Those who really care for educational progress in England are thus, in respect of essentials, less

divided than they have ever been before. There has never been so good a chance of their uniting their forces in order to overcome the widespread indifference which still exists, and to thrust aside the actual opposition to popular education which still lingers here and there, but is no longer a serious obstacle to reform. The fact that, to a degree unprecedented in England, the value of an efficient school system is now so widely appreciated among us is due in no small measure to our study of the educational methods and organization of Germany, Switzerland, and America. In this connection I would ask to be allowed to pay a tribute of gratitude to the labors of Commissioner Harris and of his colleagues in the Bureau of Education at Washington. While it is generally understood that each nation must develop its educational system on its own lines and with due regard to its own history and special needs, there is a hearty admiration for the great educational work which has been done elsewhere and a desire to attain, though perhaps in different ways, to a corresponding excellence.

What is most needed among us, in order to overcome inertia, is a strong movement of national feeling and a motive to make our schools less sectional in temper and more definitely part of the national life. The problem will be how to combine such a strong national feeling with the preservation of fruitful variety of educational traditions.

In respect of the elementary schools there is every sign that our progress will be in the direction of greater differentiation of type. The great increase of well-being in England among the artisan population has virtually produced a new class. For this class a superior type of elementary school is necessary, and is, in fact, already being provided. The English artisans are steadily pressing for elementary schools of a high order, with smaller classes, highly-trained teachers, well equipped buildings, and spa-

cious playgrounds, and supplemented by further courses of continuative instruction. Their requirements are in the way of being met, though very much still remains to be done. It is perhaps in this grade of English education that the example of America has been most potent, though the influence of our class distinctions is too strong for the parallel to be complete.

But the economic changes which have raised the artisan class to so high a point of well-being have also had the effect of stratifying the population and of concentrating in the slums masses of people who are poor, ill-nourished, ignorant, badly housed, and only to a small extent benefited by our present methods of training. In respect of this part of the social problem, ameliorative action on a comprehensive scale is urgently required. Palliatives and patchwork are inadequate to the urgency of the need. If the conditions in which these slum populations live were drastically reformed, and if the state, acting in coöperation with local authorities, took charge, in labor colonies, of the lives of those adults who showed themselves incapable of independent existence up to the standard of decency which it might impose, the welfare of the children of the slum districts could be effectively provided for; their enfeebled constitutions might be reëstablished through suitable and regular feeding; their self-respect might be established through the enforcement of cleanliness; and they might be given a course of school training based to some extent on that which has been successful in our industrial schools. In elementary schools of this differentiated type very careful attention would be given to physical training, and manual instruction, inculcating a respect for the dignity of thorough work, would form an important feature of the curriculum. Were comprehensive measures of this kind adopted, there is reason to believe that in one or two gen-

erations all the ground which has been lost would be recovered.<sup>1</sup> What, in short, is wanted is a resolve to attack this slum problem under scientific guidance, on a well-considered plan, with the help of great resources, and with the thoroughness, energy, and persistence which are displayed in great works of modern engineering. And in such a plan the labors of the school-teachers and the educational influence of a new type of elementary school would play an important part.

Our third great educational need is a better system of secondary day-schools. It is almost impossible to exaggerate the social and economic value of the service which will be rendered to the nation by such schools when they are made more generally accessible and more intellectually efficient. The cost will be great; it will be necessary to raise the salaries of the teachers, which are now too often on a quite inadequate scale, if we are to draw in sufficient numbers into the service of the schools men possessing the attainments, the skill, and the personal influence which are necessary for the efficient discharge of the duties of a secondary schoolmaster. It would seem desirable that the course should begin at latest at twelve years of age and extend till fifteen at earliest. Pupils of exceptional capacity should be drafted into these schools from the public elementary schools at not later than twelve years of age, with scholarships covering the cost of the fees, and, when necessary, maintenance allowance should be granted in addition. The curricula of the schools should be of different types, but it is probable that the study of English, Latin, and mathematics would, in a considerable proportion of them, form the backbone of the course of studies. Their aim would be to give a thorough and searching intellectual dis-

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<sup>1</sup> See report of Committee on Physical Deterioration. London, Eyre & Spottiswoode, 1904.

cipline, to develop through the corporate life of the school a healthy sense of comradeship and of public duty, and also to turn the thought of the pupils toward intelligent reflection on social problems, and to arouse in their minds a desire to throw themselves with vigor, when the time should come, into tasks of public usefulness and of social amelioration. In all this reorganization of our English schools I trust that we shall refrain from going to extremes in pressing sudden changes of aim and practice. Our best hope for educational progress lies not through contention but through conciliation and mutual agreement. Richard Baxter's words may be cited as applicable to the present educational situation in England: "Greater light and stronger judgment are usually with the reconcilers than with either of the contending parties."

## THE COLLEGE

BY WILLIAM DE WITT HYDE

[WILLIAM DE WITT HYDE, President of Bowdoin College and Professor of Mental and Moral Philosophy. b. September 23, 1858, Winchendon, Massachusetts. A.B. Harvard University, 1879; DD. and LL.D. Pastor of Congregational Church, Paterson, New Jersey, 1883-85. President of Bowdoin College, 1885. AUTHOR OF *Practical Ethics*; *Practical Idealism*; *God's Education of Man*; *From Epicurus to Christ*; *The College Man and the College Woman*; and other works.]

THE best approach to a definition of the college is by closing in upon it from the two sides of the institutions between which it stands: the school and the university. And as in the mariner's compass not only is there a north-east between north and east, but several intervening points, so we will find between the school and the college a school-college, and between the university and the college a university-college, which for our more accurate purposes we shall have to take into account. Before defining the college, let us define in the order the school, the university, the school-college, and the university-college.

The school imposes the symbols of communication, together with the rudiments of science, literature, and art, on the more or less unwilling child. I know the words "impose" and "unwilling" sound hard and harsh, and will evoke a protest from the advocates of the sugar-coated education. But with all due respect for what kindergarten devices, child-study, and pedagogical predigestion can do to make learning attractive, the school must be essentially a grind on facts and principles, the full significance of which the child cannot appreciate, and which consequently must appear hard, dry, and dull. The world is so big and complex, the mind of the child is so small and simple, that the

process of the application of the one to the other can scarcely be effective without considerable pain. Consequently in the school there must be rigid discipline, judicious appeal to extraneous motives, and a firm background of unquestioned authority. I appreciate most highly all that has been done in the ways above referred to in the direction of mollifying this discipline. But in a brief definition of a great institution the essential, not the accidental, elements—the enduring features, not the latest phases of it—must be emphasized.

The university, including in that comprehensive term graduate, professional, and technical training, is the exact opposite of the school. The school brings together the large world and the child's small mind, involving the pain of mental stretching to take in materials of which there is no conscious want. The university presupposes the enlarged mind, which it applies to some small section of truth, such as law, medicine, architecture, engineering, dentistry, forestry, Latin, history, astronomy, or chemistry. This, too, is a somewhat painful process, but its pains are of the opposite nature, due to confining the enlarged mind, full of varied human interests, to the minute details of a narrow specialty. Of discipline the university has practically nothing. It requires only intellectual results. Such moral and spiritual influences as it affords are offered as opportunities rather than imposed as requirements. Its atmosphere is absolutely free. Its professors are specialists. Its students are supposed to be men.

Having briefly defined the two institutions on either side, it might seem the proper time to present the definition of the college. But on both sides intermediary types have been evolved, which must be carefully distinguished from the college proper,—the school-college, and the university-college.



The school-college admits its students poorly prepared, and gives them in the school-college the work they ought to have done in the school. Its professors are school-masters, teaching several subjects, mainly by the school method of recitation from the book or repetition of dictated lectures. Laboratory work is confined chiefly to pre-arranged illustrative material. The conduct of the students is minutely supervised by the faculty. Little or nothing inside or outside of the recitation-rooms is left to the initiative of the students. A considerable proportion of the so-called colleges of the United States are of this school-college type. They are inexpensive; and curiously enough, the less endowment they have, the less it costs to attend them. Their graduates, unless by virtue of native wit, hardly have the breadth and initiative necessary for leadership in commercial, professional, and public life.

By the university-college I do not mean necessarily one connected with a university. A college connected with a university may be a real college, and a university-college may be connected with no university. Its distinctive mark is the application to immature students of methods of instruction and discipline which are adapted only to the mature. Its instruction is given in large lecture courses, with little or no personal interest in his students on the part of the lecturer, or required reaction on the part of the hearer. This personal contact is sometimes supplied vicariously in the person of a graduate student, or recently fledged doctor of philosophy, who quizzes fractions of the mass at stated intervals. The information imparted is the best and most advanced. The fame of the lectures is unsurpassed. But the appropriation of the material presented is largely optional. As the personal element in teaching is largely vicarious, learning in turn tends to become vicarious also. Printed notes, expert coaches, improvised "sem-

inars," reduce to comparatively few hours the labor of those who register themselves as students. Affording splendid and unequalled opportunities for the earnest and studious few, these university-colleges afford the wealthy idler the elegant leisure that he craves.

For the great majority of the students in a university-college, even athletics becomes likewise vicarious, the exertions of the elegant idler in this direction being confined mainly to the lungs and the pocketbook. In so vast a body the opportunity for social leadership and prominence in college affairs is confined to the exceptional few; impossible for the average many. The average boy of eighteen or twenty soon drifts into the irresponsibility of an unnoticed unit in the prepondering mass. Discipline in the university-college becomes practically limited to the requirements that the student shall exercise sufficient control over his animal and social instincts to maintain intense intellectual activity for two periods of two or three weeks in each college year.

By thus closing in upon the college from both sides, and marking off the institutions which come so close to it that they are often confounded with it, we have made the definition of the real college comparatively easy. We are now ready to describe its characteristic marks.

It requires as a condition of admission that the work of the school shall have been thoroughly done. Either by examination before entering, or by elimination at the first opportunity afterward, it strictly limits its students to those who have had a thorough school training. It does this because it is impossible to give a college education to an untrained mind. It is even more essential that a student shall have done hard work before coming to college than that he shall do hard work while in college. The previously trained mind can get a great deal out of college with

comparatively little work. The mind that has not been previously well trained can get very little out of college, even by hard work. This may be a stumbling-block to the school man, and foolishness to the university man; but the college man knows that in spite of these criticisms from below and from above, an amount of leisure can be well afforded in college which would be fatal in either academy or university. In order to be profitable, however, it must be the leisure of a mind previously subjected to prolonged and thorough discipline.

The method of teaching in the college is on the whole different from that of either school or university. In the school the abstract facts and principles, as laid down in approved and authoritative books, are transmitted by the teacher to the student. The individual reconstruction of those principles and facts in the mind of teacher and student, though important, is relatively less essential. If by gift of genius you get this element of individuality in either teacher or student, you are profoundly grateful; but the school can, and in a vast majority of cases must, get on without the interpreting individuality of the teacher and the reconstructive unification of the student. I am speaking not of ideals, but of facts.

Now there is room for the schoolmaster in the college, but his sphere is very limited. In formal studies like mathematics, and the elements of such languages as have been previously acquired, every college ought to have two or three thorough drillmasters on its faculty. There is nothing about a college atmosphere that can make analytical geometry easy, or the irregular French verb fascinating, or German prose sentences intelligible without grammar. Such school work as our requirements for admission permitted to be postponed until after admission to college must be done there in the hard, exacting school way.

In the university it is the individuality of the student that counts. Not the facts in the text-books; not the insight and interpretation of the professor; but the initiative of the individual student is what the university is after. The college in the more advanced courses must introduce also a moderate degree of this university element. Most of our colleges, by the group system, or by the requirement of major and minor subjects as a condition of taking the bachelor's degree, insist that something like a fourth or a third of a student's courses shall lead up to and culminate in such comparatively independent work. In this way we give every college student a taste of real scholarly work; and discover the comparatively few who are fitted to prosecute it to advantage in the university.

The college professor, the type to which the majority of the college faculty should belong, is very different from either the schoolmaster or the university specialist. He is a man who grasps his subject as a whole; deals with each aspect of it in its relation to the whole; is able to make the subject as a whole unfold from day to day, and grow in the mind of the student into the same splendid proportions that it has assumed in his own; and who can put it to the test of practical application in matters of current interest. If he is a chemist he is able to give expert testimony in court. If a geologist, he is able to take part in government surveys, or lead in exploration. If an economist, he is able to contribute something to the settlement of labor troubles. If an historian or professor of government, he must be able to bring ancient precedent and remote experience to bear on current complications. If a professor of the classics, he must love the masters of English prose and verse all the better for his familiarity with the ancient models; and show how much more the modern things mean when thrown on the ancient background. College students

despise a professor who is so lost in his subject that he cannot get out of it, prove its worth by some concrete application, and make life as a whole the larger and richer by the contribution he makes from his special department. He must be human; intensely interested in individuals; eager to see his favorite authors, his beloved pursuits, kindle into enthusiasm the minds he introduces to them. The college professor must know his subject; he must be a competent investigator in it, and a thorough master of it. If as a badge of such mastery and aptitude for investigation he has the degree of Ph.D., all the better. But this is not essential. He must know men and the large movements and interests of the world outside. He must present his subject, lit up with the enthusiasm of a great personality; an enthusiasm so contagious that the students cannot help catching it from him, and regarding his subject for the time being as the most compelling interest in life. He must be genial, meeting students in informal, friendly ways outside of lecture rooms, either in general social intercourse or in little clubs for the prosecution of interests related to his subject. He must have high standards of personal character and conduct, and broad charity for those who fall below them. In short, he must be first of all a man whom young men would respect, admire, and imitate, and love, and then in addition he must know the subject he professes in the broad, vital, practical, contagious way described above.

The course of study in a college covers in a broad way the main departments of language and literature, science and art, history, economics, and philosophy. At least four languages besides English: Latin, Greek, French, and German; mathematics; at least four sciences: physics, chemistry, biology, and geology or astronomy; history, both ancient and modern, both American and European; both

orthodox economic theory and current economic heresy, together with special study of such subjects as banking, taxation, transportation, trust and labor problems; the principles and problems of government, both national and municipal; literature studied as literature and not merely the corpse of it, in the shroud of grammar and coffin of philology; philosophy as the attempted answer to the perpetual problems of ontology, cosmology, conduct, and human aspiration; enough of fine art to make one at home in the great buildings and galleries of the world—these are the essentials of the college curriculum.

Each of the leading subjects should be presented in at least three consecutive courses extending over a year each: one elementary; one or more broad, general, interesting, practical; at least one specific, intensive, involving research, initiative, and a chance for originality. These broad middle courses are the distinctive feature of the college, and they are the hardest to get well taught. For one man who can teach a college course of this nature well, you can find ten who can teach a university specialty, and a hundred who can teach the elementary-school course. But if you dare to leave out these broad, comprehensive college courses, or if you fail to get men who are broad and human enough to teach them, you miss the distinctively college teaching altogether; you have in place of the college one or another of the four institutions previously described.

These real college professors,—these men who can make truth kindle and glow through the dead cold facts of science; who can reveal the throbbing heart of humanity through either ancient or modern worlds; who can communicate the shock of clashing wills and the struggle of elemental forces through historic periods and economic schedules; who can make philosophy the revelation of God, and ethics the gateway of heaven,—these men are hard to

find, infinitely harder to find than schoolmasters on the one hand, and specialists on the other. Yet unless you can get together at least half a dozen men of this type you must not pretend to call your aggregation of professors a college faculty; you cannot give your students the distinctive value of a college course.

The discipline of a college is different from that of either a school or a university. The true college maintains a firm authority; and will close its doors rather than yield any essential point of moral character or intellectual efficiency to student clamor and caprice. Yet this authority is kept well in the background, delegated perhaps to some form of student government, and is used only as a last resort when all the arts of persuasion and all the influences of reason fail. Not more than once or twice in a college generation of four years will it ever be necessary to draw the lines sharply and fight out some carefully chosen issue on grounds of sheer authority.

On the other hand, the college has much of the liberty of the university; yet in such wise that it cannot be perverted into license to do whatever may seem for the time being right in the eyes of immature and inexperienced youth. Spies and threats, and petty artificial penalties are as foreign to a true college as to a university. Yet the college does make the way of the transgressor hard—much harder than the university ever attempts to do.

What, then, is the secret, what is the method of true college discipline, which avoids both these extremes, yet secures the advantages at which both school and university aim? It is personal friendliness, intelligent sympathy, appealing to what is best in the heart of the college student. By intimate appreciation of all worthy student interests, ambitions, and enthusiasm the college officer comes to understand by way of contrast whatever is base, corrupt,

and wanton in the life of the little community, and to know by intuition the men who are caught in the toils of these temptations. Any competent college officer can give you, if not offhand, certainly after a half-hour's consultation, an accurate account of the character of any student in his institution; his haunts, his habits, his companions, his ways of spending time and money, and all that these involve. Where it seems to be needed, either some professor or the president has a friendly conference with the student, bringing him face to face with the facts and their natural consequences, but making no threats, imposing no penalties, simply calling the student's attention to principles with which he is already perfectly familiar, and offering him whatever help and encouragement toward amendment friendly interest and sympathy can give. Usually the whole matter is strictly confidential between officer and student, though when this proves inadequate the aid of students likely to have influence is secured, and in extreme cases the coöperation of parents and friends at home is invoked. Information that is directly or indirectly acquired through this close sympathy with student life is never made the basis of any formal discipline whatever. A student may persist in evil ways, and be known to persist in them, and be treated by the college in no other way than he would be treated in similar circumstances by his father and mother at home. If he performs his work and avoids scandal he may go on and graduate, precisely as he might continue to live under his father's roof. If his evil courses lead to failure in his work, or if they bring scandal upon the college through overt acts, or obviously injurious influence, then he is asked to withdraw.

Such, in brief, is the spirit of college discipline. It fits neither the immature nor the mature, but youth who are passing from immaturity into maturity. It appeals to the



highest and best motives, and scorns to deal with any others. It brings to bear the strongest personal influences it can summon, but deigns to use no others. It sometimes fails, but is usually in the long run successful. It presupposes absolute sincerity, perfect frankness, endless patience, infinite kindliness on the part of the college officer. It is sure to be misunderstood by the general public. It takes the average student about half his college course to come to an understanding of it. It lays those who employ it open to the charge of all manner of partiality, weakness, inefficiency, from those who look at the outside facts and do not comprehend the inner spirit. But it is the only discipline that fits the college stage of development; it does its work on the whole effectively; it turns out as a rule loyal alumni, moral citizens, Christian men.

In its religious life the college should be as little as possible denominational. The narrowness of sectarianism and the breadth of the college outlook are utterly incompatible. Denominations may lay the eggs of colleges; indeed, most of our colleges owe their inception to such denominational zeal. But as soon as the college develops strength it passes inevitably beyond mere denominational control. Church schools are often conspicuous successes. Church colleges are usually conspicuous failures. A church university is a contradiction in terms.

It is equally necessary that the college should be intensely Christian. The administrative officer should believe in the power of the best motives over the worst men and the application of great principles to little things. He should know that persons are more than the acts that they do. He should believe what most people practically deny,—that a sinner can be saved and that he is worth saving. It is only on such a profoundly Christian basis that a college can be successfully conducted. A college

which is not Christian is no college at all. For the faithful, hopeful, loving treatment of persons as free beings of boundless capacity and infinite worth is at once the essence of Christianity and the distinguishing mark of the true college.

Christianity in the college, as everywhere else in the world, presents the two aspects which Jesus contrasted in the parable of the two sons whom the father asked to work in his vineyard. There is the conscious, professed, organized Christianity, which joins the church and the association, attends and takes part in meetings, and casts about to find or invent ways to make both the world and one's self better than they otherwise would be. Sometimes, unfortunately, the Christian of this type neglects that devotion of himself to such forms of good as are already established,—the intellectual tasks, the athletic interests, the social life, of the institution. In that case the result is that, good as it means to be, good as in many respects it is, this type of Christianity fails to be appreciated by the majority of the students; the leadership of all forms of college life passes into other hands, and this avowed, expressed, organized Christianity lives at a poor dying rate, by faculty assistance and student toleration. People who forget the lesson of the parable that there are two types of Christianity, and confound this type with the whole of Christianity, sometimes take a very discouraged view of the condition of Christianity in our colleges.

What, then, is the other, the relatively unconscious, unprofessing type? Who is the Christian who, as Jesus says, in the judgment day will be surprised to find that he was a Christian at all? He is the man who lives for something bigger and better, loses himself in something wider and higher than himself. He does his work with a sense of responsibility for the honest improvement of his powers

and opportunities; or, better still, with devotion to some aspect of scientific truth or human welfare that has gotten hold of him. He enters heartily into the sports and enthusiasms of his fellows, sacrificing comfort and convenience to the promotion of these common ends. He shares his time and property with his friends, and supports generously their common undertakings. He stands up for what is right, yet always has a helping hand for the fellow who has fallen down. He looks forward to life as a sphere where he is going to serve public interests and promote social welfare, at the same time that he supports himself and his family.

Now, if this is Christianity, if the cultivation of these traits and aims is growing in Christian character, then our colleges are mighty agencies for the spread of Christianity. No man can go through one of them and catch its spirit without becoming a better Christian for the remainder of his days.

Of course it is highly desirable that these two types of Christianity should understand and appreciate each other. Especially fortunate is the college where these two types coincide; where the most prominent members of church and association are at the same time the best fellows, and where the best fellows give their influence and support as officers and workers in distinctively Christian organizations. In some men's colleges, and in most women's colleges, this is happily the case. If, however, we can have but one of the two types, as often happens, we must agree with Jesus that good work and good fellowship on a basis unconsciously Christian are better than a conscious profession which remains self-centered and self-satisfied, outside the more genial and generous current of the life of the community.

The last feature of the college, but by no means the

least significant, is this genial, generous, social life. Even if nothing were learned save by absorption through the pores, the intimate association with picked men of trained minds for the most impressionable years of one's life would almost be worth while. To take one's place in such a community, to bear one's share in its common interests and common endeavor, to take the social consequences of one's attitude and actions in a community which sees clearly and speaks frankly, rewards generously, and punishes unmercifully, is the best school of character and conduct ever yet devised.

This is the leading consideration in determining the desirable size of a college. As Plato says of the state, we may say of the college,—it should be as large as is consistent with organic unity. If some types of life and character, the rich or the poor, the independent or the conservative, the high scholar or the good fellow, the athlete or the man of artistic temperament, are left out, then it is too small. If, on the other hand, a man can be a mere unit in a mass toward which he feels little or no definite responsibility; if his specific contribution is not needed and his individual opinion does not count; if the games are played, and the papers are edited, and the societies are managed, and things generally are conducted by experts whom he merely knows by sight and reputation; then that college is too large for him; he will probably come out of it as small as he went in.

For the most enjoyable and profitable social life the college community inevitably breaks up into little groups,—fraternities, musical associations, athletic teams, and clubs for scientific, literary, historical and philosophical study. Extension and intensity are inversely proportional; and a man who misses the closer contact and warmer fellowship of these smaller groups misses much that is most val-

uable in college life. Athletics are carried to excess, as is everything else in which youth take a leading part. But the incidental excesses of a few individuals are much more than counterbalanced by the increased physical health, moral tone, and freedom from asceticism and effeminacy in the college community as a whole. Cut off as they are from the natural outdoor tasks and sports, from chores and workshops, from hunting and fishing, from sailing and riding, some artificial outlet for physical vigor is absolutely essential. Some object for community enthusiasm, community loyalty, and community sacrifice is equally a moral and social necessity. The worst evil of athletics is not the effort put forth by the athletes themselves, but the extent to which these interests absorb the time and conversation, the thought and aspiration, of both combatants and non-combatants. Even this evil, great as it is, is small in comparison to the moral evils which would infest a group of vigorous young men from whom some such outlet was withheld.

The fraternities and societies likewise have slight possibilities of evil, but accomplish an overwhelming preponderance of good. It is through them, directly or indirectly, that the most effective personal and social influence can be brought to bear on those who need it. Occasionally a fraternity drops to the level of making mere good-fellowship an exclusive end, to which scholarship, morality, efficiency, are merely incidental. A college is fortunate which at any given time does not have one or two fraternities that are tending in this direction. But the contempt of their rivals, the influence of their graduates, the self-respect of the better members themselves, together with direct or indirect faculty remonstrance, serve to bring a fraternity to its senses in a quarter of the time it would take to straighten out an equal number of isolated individuals.

Isolated good and isolated evil are more nearly on an equality. But good influence can be organized and mobilized a hundred times as quickly and effectively as evil influence; and where the moral forces in faculty and students are alert, the fraternities serve as rallying-points for the concentration of the good and the dispersion of the evil.

Departmental clubs, in which one or two members of the faculty meet informally with a few of the more interested students for conference on some phase of their subject, are perhaps the consummation of the college spirit. Modern methods of instruction, however, make contact in the laboratory over experiments and in the library in research so close that many of the regular classes assume more the aspect of a club than a class. The newest and best college libraries provide small rooms for the use of books by professors and students together in each literary and historical department; and regard such rooms quite as indispensable as the room where books alone are stored.

There is one serious danger, and only one, that besets the college. The ordinary objections, hazing, excessive athletics, dissipation, lawlessness, idleness, are due either to exaggeration of exceptional cases, or the unwarranted expectation that large aggregations of youth will conduct themselves with the decorum that is becoming where two or three mature saints are gathered together for conference and prayer. I grant that a man who cherishes this expectation will be disappointed; and if he chances to be a college officer, and undertakes to realize this expectation, he will be deservedly miserable. With all its incidental follies and excesses, college conduct is more orderly, college judgment is more reasonable, college character is more earnest and upright, than are the judgment, conduct, and character of youth of the same age in factories, offices, and stores, or on farms or on shipboard. As far as these matters go, college

is physically, mentally, and morally the safest place in the world for a young man.

The one serious danger is so subtle that the public has never suspected its existence; and even to many a college officer the statement of it will come as a surprise. It is the danger of missing that solitude which is the soil of individuality and the fertilizer of genius. College life is excessively gregarious. Men herd together so closely and constantly that they are in danger of becoming too much alike. The pursuit of four or five subjects at the same time tends to destroy that concentration of attention to one thing on which great achievement rests. The same feverish interest in athletics, the same level of gossip, the same attitude toward politics and religion, tend to pass by contagion from the mass to the individual, and supersede independent reflection. The attractiveness and charm of this intense life of the college group tends to become an end in itself; so that the very power which wholesomely takes the student out of himself into the group invites him to stop in the group instead of going on into those intellectual and social interests which the college is supposed to serve. This devotion to college rather than to learning; to the fellows rather than to humanity; to fraternities and teams rather than to church and state, is a real danger to all students, and a very serious danger to the exceptional individuals who have the spark of originality hidden within their souls. The same forces that expand small, and even average men, may tend to repress and stunt these souls of larger endowment. To guard against this; to make sure that the man of latent genius is protected against this deadening influence of social compulsion toward mediocrity, is one of the great duties of the wise college professor. He must show the student of unusual gifts that he is appreciated and understood; and encourage him to live in the college atmosphere

as one who is at the same time apart from it and above it. The formation of little groups, temporary or permanent, among the more earnest students for mutual recognition and support, groups which actually do for a student while in college what Phi Beta Kappa attempts to do in a merely formal and honorary way afterwards, may help these choice minds to stem this tide of gregarious mediocrity. Wherever the faculty is alert to detect its presence, even genius can thrive and flourish in a college atmosphere.

Such is the college. It is an institution where young men and young women study great subjects, under broad teachers, in a liberty which is not license, and a leisure which is not idleness; with unselfish participation in a common life and intense devotion to minor groups within the larger body and special interests inside the general aim; conscious that they are critically watched by friendly eyes; too kind ever to take unfair advantage of their weaknesses and errors, yet too keen ever to be deceived.

The function of the college follows so obviously from the concept that it requires but a word to draw the inference. It makes its graduates the heirs of all the wisdom and experience of the ages; placing, if not within their actual memories, at least within the reach of their developed powers and trained methods any great aspect of nature or humanity they may hereafter wish to acquire. It gives each one of them a sense of achievement and mastery in some one subject of his choice, giving him, in that one department at least, the impulse to read its books and study its problems as long as he shall live. It places its alumnus on a plane of social equality with the best people he will ever meet, and gives him a spirit of helpfulness toward the lowliest with whom he will ever come in contact. It makes him the servant of the state in wise counsel and effective leadership. It gives to the church ministers who can do more than turn



the cranks of ecclesiastical machinery and repeat ritualized tradition—prophets who gain first-hand contact with the purposes of God. It prepares men who will bring to the study and practice of law ability to apply eternal principles and ancient precedents to the latest phases of our complex civilization. It trains its graduates who practice medicine to give every patient the benefit of whatever science is developing of healing efficacy for his particular case. It trains men who are to be engineers, bankers, manufacturers, merchants, to put the solidity and integrity of natural law into the structures that they rear, the institutions they control, the fabrics they produce, and the transactions they direct. It trains men and women who will give to domestic and social life that unselfishness and geniality which comes of having the mind lifted above the selfish, the artificial, the petty, into sincere and simple intercourse with the good, the true, and the beautiful.

The function of the college, then, is not mental training on the one hand nor specialized knowledge on the other. Incidentally it may do these things at the beginning and at the end of the course, as a completion of the unfinished work of the school, and a preparation for the future pursuits of the university. The function of the college is liberal education; the opening of the mind to the great departments of human interest; the opening of the heart to the great spiritual motives of unselfishness and social service; the opening of the will to opportunity for wise and righteous self-control. Having a different task from either school or university, it has developed a method and spirit, a life and leisure of its own. Judged by school standards it appears weak, indulgent, superficial. Judged by university standards it appears vague, general, indefinite. Judged by its true standard as an agency of liberal education; judged by its function to make men and women who have wide

interests, generous aims, and high ideals, it will vindicate itself as the most efficient, the most precise means yet devised to take well-trained boys and girls from the school and send them either on to the university or out into life with a breadth of intellectual view no subsequent specialization can ever take away; a strength of moral purpose the forces of materialistic selfishness can never break down; a passion for social service neither popular superstition nor political corruption can deflect from its chosen path.

I cannot sum up the function of the college better than in words formerly used in reply to the question of a popular journal, "Does a College Education Pay?"

To be at home in all lands and all ages; to count nature a familiar acquaintance, and art an intimate friend; to gain a standard for the appreciation of other men's work and the criticism of one's own; to carry the keys of the world's library in one's pocket, and feel its resources behind one in whatever task one undertakes; to make hosts of friends among the men of one's own age who are to be leaders in all walks of life; to lose one's self in generous enthusiasms and coöperate with others for common ends; to learn manners from students who are gentlemen, and form character under professors who are Christians—these are the returns of a college for the best four years of one's life.

# PRESENT PROBLEMS OF THE UNIVERSITY

BY EDWARD DELAVAN PERRY

[EDWARD DELAVAN PERRY, Jay Professor of Greek and Dean of the Faculty of Philosophy, Columbia University, New York. b. Troy, New York, 1854. A.B. Columbia College, 1875; Ph.D. Tübingen, 1879; LL.D. Columbia College, 1904. Post-graduate, Leipzig and Tübingen, Germany; Columbia University.]

WHEN one examines in turn the universities of the great nations which lead the world's civilization one is struck by the diversity of their history, of their aims, of their organization and operation, and by the difference in the measure of influence which they exert in the several countries which support them. Starting mostly from the model of the University of Paris, passing through endless vicissitudes of ecclesiastical, governmental, or corporate control; in turn endowed and plundered, fostered and suppressed; the centres now of ultra-conservative, now of extreme radical tendencies in religion, in politics, or in scientific theory; in one place content merely to impart to youth of still tender age a modest measure of inherited learning, altogether theoretical and unpractical, in another subordinating, even sacrificing, everything else to the development and maintenance of technical schools, in yet another unwearied in the pursuit of advanced scientific investigation of all sorts; in one age and place if not actually stationary, yet rather moved than moving in the resistless current of the world's progress with faces firmly fixed upon the past, in another eagerly peering into the gloom of the unknown which their own light shall yet illumine—do these protean institutions contain a common element that justifies us in assuming the

existence of problems that affect them all alike, be they European or American or Asiatic, ancient or of yesterday, poor and struggling or proud in the rich endowments of centuries or in the more than princely benefactions of a single generation? When even the name university seems to have taken a new signification and use in every country where it occurs (and in none so many or so puzzling applications as in our own United States), what problems can there be, common to them all, that are not in equal degree problems of the secondary school, or of the college, or of the technical school? And if such problems can be isolated, how do they differ, as "present" problems, from those that confronted our ancestors or our immediate predecessors, or from those that continue in existence as questions still unsolved?

A starting-point for the response to these questions may perhaps best be found in this simple fact: In every country of the civilized world the institution which gives the most advanced instruction, whatever form that may take except the exclusively practical, is called a university. Such an institution may do this well or badly, may do few or many other things besides giving this kind of instruction; but the feeling is universal that this kind of organization does something which others are not expected to do, which in most cases they cannot do. Unfortunately the converse is not universally true; in our own country scores of so-called universities are no more than high schools, and poor ones at that; but in every civilized land the highest level of educational achievement is reached by a university.

It is a commonplace that every institution, to be influential and really profitable to the life of the nation as a whole, must be in harmony with the national spirit and ideals. This would seem to give us naturally as many types of universities as there are nations, and to a limited extent

this is true, though it has often been pointed out that all the varieties are referable to two or three early forms. The most intensively and exclusively national forms and tendencies have their proper place in the schools; here if anywhere the seeds of patriotism must be sown and character developed in accordance with ancestral and national traditions. In the schools, therefore, in the colleges, by whatever name we choose to call the institutions whose pupils are expected merely to acquire knowledge and to develop character, we expect to find the greatest diversity in the practices and interests of different nations. Each people must here work out its own salvation, with an eye to its own profit; it should learn what it can from the experience and example of others, but its responsibility begins and ends with itself so far as the mere transmission of acquired knowledge is concerned. But when we pass on to the actual increase of human knowledge and to the training of the maturer minds to take their part in thus pushing out the boundaries of the known, we necessarily overstep the limits of the national, and enter upon ground common to all the nations of the earth. Here the interests of civilized nations can only coincide, and on this ground must meet the institutions which in each country, whether organized especially to this end or not, carry on this work as far as it is carried on at all. These are, preëminently, the universities. They may be of one form or another, with simple or complicated aims; but this responsibility is theirs, this duty and opportunity. If they perform this duty to the best of their ability they justify their existence, whether they do other things or not; if they neglect it, though they may turn out accomplished and well-read gentlemen, fitted to enjoy to the utmost whatever pleasure comes their way, or eminent lawyers or physicians, or brilliant engineers or chemists, they fail in the one point wherein their opportunity, and conse-

quently their duty, are unique. And this is as true of the universities in the newest country as of those in the oldest. Service, and training for service, of our fellow men is, or should be, the keynote of modern education. But there are many forms of service, many ways in which the trained man or woman may help along the world's advance in civilization; and who is justified in saying that an occupation which to him seems profitless and a mere amusement may not contribute in the end to the sum of human welfare? Whatever else the university may do or leave undone, it cannot without being unfaithful to its highest opportunity neglect to train *some* persons to be contributors to the sum of human knowledge, to be investigators. It may do, and in most instances is organized to do, many things beside this, and so far as it does these well it is fulfilling more or less well its duties toward the nation in which it exists; but its duty toward the world at large is not fulfilled unless it helps in the work of actual research and uses this activity as an inspiration and model for those of younger generations who shall take up the torches that fall from the hands of their elders and carry them a little further onward.

In the obligation to service of this sort I conceive the common ground of universities the world over to lie; here is their point of contact, here their bond of union, and from this common point of view are visible many problems that concern them all alike—problems that can be solved only by coöperation of many countries. *Getrennt marschieren, vereint schlagen*, is a principle that must at last prevail in the world's highest educational practice no less than in its wars; marching by way of its duty to its own country, each university must strive to pass beyond that and to reach the ultimate goal of service to the whole human race.

Is the problem thus confronting the universities of the world a modern problem exclusively or chiefly, so that the

experience of our predecessors can help us but little to solve it?

It is chiefly a modern problem, because it is only in very recent years that great nations have begun to look steadily abroad in educational matters, to view themselves as reflected in the views of other nations, to profit by the experience of those others; because enormous advances in science of all sorts have been made within a century, countless new fields of investigation opened up, and old ones reexplored. The doctrine of free investigation in all directions possible to the mind of man *as the duty of the university*, of complete *Lehrfreiheit*, is comparatively recent, and not even yet adopted without reserve by some of the oldest, richest, and most famous universities of the world. For centuries after the beginning of universities in Europe these institutions regarded as their one duty the handing down of knowledge given to them by earlier ages; for them truth, as Paulsen puts it, "*war ein Gegebenes*," something "delivered," not something to be found out. "The *content* of instruction was provided for the medieval university; its task was to hand down the fixed body of learning." To Germany belongs the honor of having, first among nations, seen the inestimable advantage to the nation at large of so identifying the principle of research in all fields with the university that "university teacher" and "investigator," "leader of scientific thought," should become practically synonymous terms, and that the nation should look primarily to its universities and to men trained in them for counsel and guidance. This is, it seems to me, the vital point of the whole matter—the impregnation of the students of a university with the same enthusiasm for widening the bounds of human knowledge that is felt by those who guide the university, so that whatever their profession, they may practice it with an eye to this as well as to their personal

success. The teacher who succeeds in doing this with a single pupil is in effect a university teacher. Herein is the fundamental difference between the university of to-day and the university of the olden time. It is to-day expected to turn out trained men and women for the professions, and thus to serve Church and State no less than was the university of old; but above and beyond this, to serve humanity at large by the insistence upon the pursuit of truth for its own sake. If the teachers of our youth feel this enthusiasm within them, it cannot fail to take root in the hearts of their pupils.

What must the universities do to exert such an influence as widely and deeply as possible in the world, along with the other functions traditionally and properly assigned to them?

Research alone, uncoupled with training in its methods, is rather the duty of such bodies as the learned "academies" existing in some countries, or of the fortunate individuals who can give their lives to it, than of the universities. This narrower view of research was the one held for generations by the great English universities, when they have held it at all, and until the most recent times "research" meant for them chiefly literary, mathematical, and, to certain extent, historical investigation. It is plain also that research, along with such training in methods, cannot be the only functions of even the ideal university. There are the professions to be provided for; the welfare of the community demands the existence of highly trained experts, both as practitioners and as teachers; and to abandon the training of these to purely technical or professional schools would be suicidal for the universities, and a calamity to the state.

Our own country is much too lax in this respect, and is full of incompetent practitioners, by no means all of whom



are self-taught; most have graduated from some school which has the right to bestow degrees. In some other countries, wiser than ours in this particular, the practice of a profession is made in effect impossible for those who have not been trained in a university school, and governmental control of the latter holds them rigidly to a high standard. In lands where this regulation is impossible, owing to the form of government or to deeply rooted traditions, the duty of upholding the highest standard of professional training falls upon the universities. These can, by providing the best training to be had anywhere, attract the best men to their schools, and with them leaven the whole body of practitioners.

The university, to be serviceable to the fullest extent, must be impartial in its welcome to subjects of research. It must not proscribe certain fields of research or withdraw its support from investigations therein merely because few students are attracted to them, or because such studies seem unpractical and not likely to "pay." After a long and hard struggle the natural sciences have, in many quarters, prevailed, and by reason of the countless ways in which the results of researches therein can be put to practical use, for commercial profit and for the physical welfare of man, their appeal, particularly in newer countries, drowns the voice of the advocate of the philosophical, philological, and historical sciences. Unfortunately the bitterness of controversy is not yet extinct; the scorn formerly poured out in blind wrath by the "classical men" upon studies in natural science has been returned with interest. The classical languages and literatures seem threatened with starvation by withdrawal of their nutriment. A naturalist, who will cheerfully spend his life in determining the number of recognizable variations in a species of beetles, will be heard to sneer at researches into the history of

human institutions or of human speech, no less bitter and one-sided in his views than the classical scholar who sneers at him. Yet as long as man's associations are with his fellow men, as long as he remains the "political animal" of Aristotle, so long will the sciences that make for the comprehension of man, of his history, of his future, deserve at least an equal place with the sciences of the extra-human world. No knowledge, however, extensive and accurate, of natural science can dispense us from the need of better knowledge than we possess of the human mind, of human passions, and human ambitions, of the history of mankind upon the earth. The person who discovers or helps to discover a law of any part of the vast complex which we call nature is a benefactor of the race; but so also is he who discovers a law of the human mind, whether that be manifested in language as the instrument or in literature as the form of expression, in statutes and ordinances of civilized peoples or in uncouth customs of savages, in works of painting or sculpture or architecture or music, or in the countless manifestations of man's religious emotions, beliefs, and practices. "We make the world a better place to live in," say the "practical" men. "Yes," say the "theoretical" men, "and we, by making men better fitted to live in it, also make it a better place to live in; for it is made up of human beings no less than of inanimate things." Each is fully justified in his pride, and the latter is performing as noble and permanent a service as the former; each is contributing to the progress of the race.

But the mere limitations of endowment, not to mention others, make it in most cases impossible for any one university to provide courses of research in all fields of human knowledge. Such instruction is very costly, sometimes almost prohibitively so, and the other needs which the uni-

versity must meet are more immediate and pressing. Here is where intelligent and unselfish coöperation, to a far greater extent than has yet been seen in the world of higher education, is imperatively called for. In how many parts of the world we see within the compass of a few miles two or more universities attempting the same work with insufficient endowments, inadequate faculties, and a discouragingly small number of students, while mere local pride and a mistaken kind of loyalty prevent consolidation or partition of the fields to be covered. Such partition of work of course implies the right of the student to migrate freely from one university to another, without sacrifice of his standing or loss of time or credit. In the first period of development of European universities this migratoriness of students, even beyond national limits, was very marked; then a reaction set in, owing to the growing bitterness of feeling between neighboring states, or even districts, intensified by confessional differences; for example, in the eighteenth century the subjects of certain German states were **actually** forbidden to attend the universities of certain others. But since the end of the eighteenth century migration of students among the German, Austrian, and Swiss universities is commoner than persistence of residence at one university. The benefits of the custom have been too often set forth to need discussion here. But there is need of still further progress; not only must the migration from country to country, already in fashion in certain directions, be encouraged, but currents must be made to flow in both, nay, in many directions. Inestimable benefits have already accrued to American education in all its stages from acquaintance with the ideals and methods of other countries. On all sides we have seen, of late years, educational commissions sent from one country to another to observe and report. Probably there are few states of the civilized world

that have not some lessons to teach the others; the thoroughness of German scholarship, the elegance and precision of the French and English, are reciprocally needful. America, for generations viewed as merely a learner by the nations of Europe, and still needing much light, has at last become recognized as a possible teacher, and seems in a fair way to repay at least a part of her educational debt to older countries. It has recently been well said that while in America much time is wasted in the schools, in Germany an equal amount is wasted in the universities. We may still learn from Germany how to correct the one evil, even though the conditions in the two countries differ so greatly; and Germany may perhaps learn from our practice how to correct the other. There are already encouraging beginnings of reciprocal action in the interchange of students. The French Government several years ago entered into relations with one or more American universities for such an interchange, on fellowship stipends. Only last spring some eminent professors of German universities, while on a visit to the United States, expressed the hope that it might soon be made possible for Germans to spend a part of their time of study at American universities, with full credit at home for the time thus occupied, just as some of our universities allow time spent at a foreign university to be counted toward their own degrees. A movement in this direction has already been made by the Philosophical Faculty of Berlin. As the other states of the Empire are apt to follow Prussia's lead in educational matters, we may hope to see this privilege extended to the Saxon, the Bavarian, and the Badensian student as well.

The Rhodes Scholarships, in some respects a curiously one-sided benefaction, may yet serve indirectly a wider purpose than their founder foresaw; they may yet lead to re-

ciprocal provision for foreign study on the part of Englishmen, and so find their own usefulness doubled.

The university must be democratic. It must not serve directly or indirectly the exclusive interests of one part or class of the community, whether that part be the social aristocracy, or the church, or the technical practitioners, or the adherents of one or another form of political theory or religious belief. This does not mean, however, that it should admit to its work or lectures every person that chooses to apply. On the contrary, admission to research and professional training must be restricted, and closely; but the restriction must be merely one of qualification for work of the character which the university is called upon to do. Restriction because of lack of residential accommodation is, for the university as such, most unwise, for often those excluded are better fitted for its work than those admitted, who may be admitted for other reasons—family or political or religious connections, ability to pay the prices demanded, and so on. Nor does restriction on account of sex seem to me possible of retention for many years longer. One has only to compare the situation of to-day with that of twenty-five years ago to understand how irresistible is the tendency toward equality of the sexes in respect to opportunities of education. The desire for large numbers of “graduates” and professional students, merely from satisfaction in the contemplation of large numbers, is a serious danger to which American universities are peculiarly exposed. In advanced work not a very great number of students can be properly handled at one time; for mere lectures it makes perhaps little difference whether the instructor addresses twenty-five or two hundred students, but the more modern methods of laboratory and seminar have brought with them a necessary restriction in the size of classes, and the personal relations borne by the most

successful teachers towards their advanced students cannot, in the nature of things, be extended to very many at once. A selection must always be made. In the first instance only those thoroughly qualified by previous training to profit by the courses should be admitted to them—except in certain cases as “hearers” or “auditors”—and only the most promising of the whole number to the advanced work. It is in my opinion a very grave though a widespread error to suppose that the university which admits the most students does the greatest service to the community. That greatest service is done by the institution which holds its standards high and firm; not so high indeed that only the exceptional student can hope to reach them, but so high that its certificate of approval, its degree, shall be accepted as a premium all over the educational world. This view is often decried as “undemocratic,” particularly in America, and when applied to the professional schools of our universities. But democracy can here logically imply no more than the lack of restrictions arising from birth, class, belief, or sex; no democratic spirit can insure the making of a competent scholar out of poor material, or justify hampering the man of good endowment and training by yoking him with others who can never maintain his pace. The welfare of the country demands that there be some who can push on far in advance of their fellows, and it is the worst spirit of trades-unionism which would hinder them under pretense of giving all others an equal chance with them. The welfare of the country is greater than the apparent collective welfare of all the units that compose it; in things spiritual the whole is often greater than the apparent sum of its parts, because some of the most important parts cannot be estimated alone, but only in their effect upon others, as quickening and inspiring influences. The number of persons admitted to the universities, in any country,

who are fitted by nature to become exclusively investigators, is very small. Here it is particularly true that many are called but few chosen; but any one who is fitted by nature to become a good practitioner ought to be able to learn how to investigate for himself, and so to add something to the sum of human knowledge, in connection with the exercise of his profession. This is the kind of professional man that the university should expect to turn out; not the physician who is content with merely curing his patients; nor the mining or the civil or the electrical engineer who is content merely with making his creations pay dividends; nor the lawyer who is content merely with winning his cases; but men of all these professions who look beyond practice to actual enlightenment of places that are still dark, though it be given to each one to shed only a tiny gleam of light which reveals a minute speck of truth hitherto unknown. This is one form of the ideality for which the university as such must strive; not only the ideality of the poet, the painter, or the musician, but also an ideality which may inhere in geology as well as in Greek, in anatomy as well as in the history of literature—an ideality which transfigures all study, and fills the pursuit of even the most practical profession with the noble passion for the things beyond and above mere "success in life." By this the university makes of its children an aristocracy within a democracy, not hostile to that democracy, but preservative of it; an aristocracy that is not a "close corporation," but open to every one competent to reach it; not reproducing itself from within, but replenishing itself from without. "Aristocracy" is a noble word, though often dragged in the mire by those who should hold it free from taint; and the aristocracy of mind and education can imperil the liberties of no community. The university, and these men and women its offspring, must lead public opin-

ion and not follow it; nor must they sit aloof from the national life nursing their superior culture in a fine sense of detachment. The university graduate who does not feel that he owes service to the community as his *γενέθλια*, as the thank-offering for his spiritual birth, is an unworthy son of his *alma mater*, and the university that has not made him feel this duty is an unworthy spiritual parent; but his service, so far as lies within his powers, should be one that can be performed by none in the community so well as by himself. The millions of money annually spent upon universities are wasted if their "output" does not show itself able to do what the rest of the community cannot do.

I have dwelt at length upon these general phases of the whole duty of the university because this seems to me greater than all other problems of the university, and greater now than in any previous age because of the profound changes already taking place or imminent in every civilized community. The problem is: How can the university make of itself the most efficient instrument for giving, with or without professional training (in which latter I include of course the profession of teacher) the enthusiasm and proper training for research, the latter being recognized as the most important of all, the *sine qua non* of university training? The injection of the transfiguring ideality of which I have spoken above into university teaching in all its ramifications is a process necessary in every country that maintains a complete system of education, and must be carried out by each country in its own way. In some it is practically accomplished already, in others hardly begun. The many other specific problems which confront the universities are, in my opinion, all subsidiary to this, and the solution of each of them but a different way to this end.

I have spoken thus far as though but one type of uni-



versity existed, a type more closely resembling the German than any other, yet not German because of the inclusion in it of the technical schools, which in Germany are separate from the "universities," with their time-honored "four faculties" of theology, law, medicine, and philosophy (though in some German universities we find, as is well known, a subdivision of one or another faculty). This I have done to avoid confusion; and it seems necessary now to explain that so far as I know no university of exactly this type exists anywhere in the world. Certainly not in the United States, because those few which include the "four faculties" include also "undergraduate colleges," the aim of which, while not contrary to the ideal of the university, is not coincident with it, but rather preparatory and conducive to it. Not in England, where the "university" is either a group of colleges which do almost all the teaching, or merely an examining body, or as yet merely an incomplete institution consisting chiefly of technical schools; and not on the Continent of Europe, because there the technical schools are still separate institutions. Yet the ideal which I have tried to formulate is pursued in England, in the United States, and on the Continent of Europe, and in other parts of the world. By "university" in the United States I mean so much of one of our complex and heterogeneous institutions as trains for the work of research of an advanced character, whether coupled or not with professional instruction, to which training are admitted only those who have had a previous training roughly to be estimated, in accordance with American custom, by the baccalaureate degree or its equivalent. This part of such an institution has to solve "university problems;" or rather, the institution as a whole has to solve them for that much of itself, along with many others which affect other portions of its complex organism. These questions are thus

made much more difficult of solution for American institutions than for those of older countries. The American "university" is tending to become a huge *magasin*, an emporium of learning, a sort of Ministry or Department of Education. In its desire to be all things unto all men it is apt to lose sight of the logical distinctions between different stages and fields of education, and to assume that everything it does is exactly as important as everything else done by it, or by any other institution.

The first problem that presents itself is naturally that of money. Probably no university exists which has all the money it needs; such a one would be an absurdity in the world of education. A university which has all the money it needs does not deserve all that it has; it condemns itself out of its own mouth, by confessing that it can think of no new paths in which to strike out, or does not care to enter upon them. A school, even a college, may conceivably have money enough; not so a university. Instruction in methods of research is well known to be the most expensive of all kinds. The great specialists in medicine and law and engineering and chemistry command, as practitioners, fees far in excess of anything that a university could afford to pay them as salaries if it demanded all of their time and activity. It is fortunate for the universities that the profitableness of actual practice often does not appeal at all to the men best fitted to instruct, and that in other cases men eminent in practice, satisfied with the income produced by devoting part of their time to it, use the rest in lecturing or conducting courses of research in a university or professional school. It is plain to every one that large and commodious laboratories are needed for even a few advanced students, although fine laboratories and equipment do not of themselves make investigators, any more than fine art schools necessarily turn out great painters or sculp-

tors, or fine conservatories of music great composers—the right kind of men must be there to use them. The scientific spirit and insight and patience and training which make discoveries would doubtless make them anyway with the merely necessary materials at hand; but good equipment makes for good work. The danger here lies in the temptation to mere splendor. The need of well-equipped libraries is less evident to the outsider—sometimes least evident to the Maecenas from whom donations are fondly expected (I speak as an American)—yet it is not less great than that of laboratories. It is probably not too much to say that the need least well supplied, in all universities but a very few exceptionally favored ones, is that of proper endowments for the constant purchase of books. Other equipments too are requisite: museums and collections; and for the history of art, casts, photographs, engravings, models, at least in universities where there is not ready access to good public museums. The rapidity with which large sums disappear when applied to such objects is only too familiar to those who are charged with the duty of providing and administering such collections. Another temptation, particularly hard to resist, is that of devoting the endowments chiefly to things that bring in an immediate return—the “things that pay,” as the phrase is. How to touch the generous impulses of the men of wealth, or convince the rulers of the state of the university’s needs, and to do this without sacrificing the ideal of the university to please the whim or vanity of the one or the other—this is one of the greatest and most insistent problems, and it grows greater and more insistent with every year, because of the constant advance and ramification of human knowledge.

The question of the best organization for the work that the university has determined to do is no sooner apparently settled than it again raises its head. Of course in the

United States, where new organization and reorganization are constant, this problem is particularly pressing. It here presents itself in different aspects to East and West. To the older East, with its great institutions of learning built up on a collegiate foundation, for generations undergraduate colleges, on which have been grafted from time to time professional schools with little or no organic relation to each other or to the central stem, the problem has been largely one of favoring the new without sacrificing the old, of bringing to the institution as a whole that feeling of solidarity which naturally inheres in an "undergraduate" college. In the West, in the state universities, where the professional and technical schools have from the first held the more important place, the conditions are almost reversed. In Europe the technical schools have from their first establishment stood on altogether different ground, as something apart from the university, requiring a different preparation of candidates for admission, and in most cases possessing decidedly inferior social prestige. But this condition is passing away in Europe; it is coming to be seen, for example, that medicine and law are quite as truly technical professions as engineering and architecture, and the latter quite as well entitled to be called "learned professions" as the former. Germany has begun to wipe out the invidious distinctions between *Hochschulen* pure and simple, *i. e.*, universities, and *technische Hochschulen*, formerly called *Polytechnica*. In Prussia the *technische Hochschulen* have had, since 1899, the right of giving the doctor's degree in engineering, and the other states of the Empire have followed suit. This has naturally reacted upon the secondary schools which are feeders to these institutions—a point to be touched upon presently.

What is to be the attitude taken toward technical schools by the university which includes them in its corporate mem-

bership? For the United States this is indeed a burning question. Are the technical and professional schools to be viewed and treated as undergraduate or as graduate schools? That is to say, shall they or not admit students who have not had a preliminary training indicated by the possession of a bachelor's degree? Hardly any two institutions in America are answering that question in the same way. Some of the Eastern institutions have made the schools of medicine and law "graduate" schools in that sense, but none has yet had the courage to take the same step with regard to the technical schools—of chemistry, engineering in its many forms, and architecture. Here is, it seems to me, an exceedingly great opportunity for the larger and more powerful institutions of the United States to serve the ultimate welfare of the country, by putting all their technical and professional schools on a graduate basis. Probably no one now alive will see the abolition in this country of technical and professional schools unconnected with any university. These, so far as not controlled by the state, will go their own way, for the most part (of course there are honorable exceptions) aiming to "fit for practice" in the shortest possible time, and taking little or no account of the ideal emphasized above,—the ideal of research, of training in methods of research, of encouragement and inspiration to research, as the proper ideal of the university, whether that be done in connection or out of connection with training for professional practice. The university's technical and professional schools should be put and maintained on a higher plane. If in the course of time they drive the others out of existence, so much the better—the fittest will have survived; if not, it will surely be better for us to have the higher ideal and its partial realization before the eyes of the country and the world than to see the lower one everywhere prevailing. For here is

the point of contact with other lands and other civilizations, and we shall be measured by the best of what we have accomplished. The professions are steadily assuming a more and more important and commanding position in the world. The universities, to keep their hold on the nation, to be the leaders which their duty calls them to be, must identify themselves with the professions as never before, but with only the very highest forms of professional education. For them to lose their traditional hold on the older professions, or to fail to secure a firm hold on the newer ones, would be for them to lay the ax to their own roots. To keep and secure this hold they must make themselves everywhere in the world recognized as the centres of research. Paulsen said, some years ago, that some of England's greatest lights in science would be inconceivable as members of an English university. That is a terrible indictment to bring against a university; fortunately it is less true now than in 1893, when he said it; and it is becoming less true every year.

I have said little or nothing, in this connection, of that part of the university, whether it be an American or a European university, which is not commonly considered professional or technical: the part called "philosophical faculty" in Germany and most countries of Continental Europe, and including the parts devoted to political science and economics, and to mathematical and natural science, which in some places are organized as separate faculties; in others included in the faculty of philosophy or elsewhere. Some of our American universities comprehend all these parts under the collective name of "graduate" schools—an insufficient designation in those institutions which made one or more of the professional schools also into graduate schools. The history of this part of the university body has been singularly varied. At first, in Europe, subordinated to the other faculties, it has been raised to per-

fect equality with them, and in general has maintained the ideal of theoretical research far more completely than the other faculties; yet in Germany it has become almost as much of a professional faculty as the others, having been made the pathway to the profession of teaching in the schools of higher rank. In the United States also the tendency is strong in the same direction; the majority of those who, as graduate students, pursue courses leading to the degrees of master of arts and doctor of philosophy do so with a view to becoming teachers. Here, too, almost without exception, are found those students who, without thought of active professional practice, pursue their work for the sake of study and research alone as far as the university can guide them. This is naturally the most "theoretical" part of the university, the least exclusively professional and technical; there is nothing like it to be found outside of university organization, whereas the work of the theological, the legal, and the technical faculties is almost everywhere duplicated outside. In fact, taking the Christian countries as a whole, theological training is given much more outside of universities than in them, and the same is true of technical training. This "philosophical" part of the university (I use the name without prejudice to the others—not as if they were necessarily unphilosophical, and not in the narrower sense of the term)—this part is preëminently called upon to maintain the ideal of research. It has no *raison d'être* if it does not maintain it; but it is not called upon to maintain it single-handed. It is important that the philosophical faculty, in the wider sense, be a large part numerically of every university, and that it be not subdivided in any such way as to weaken its solidarity. The task of fitting teachers for the higher school work, and, of course, those who look forward to giving instruction in non-professional subjects in colleges and universities,

will always be peculiarly its own, and these teachers must be imbued with the idealism which shall protect them from degeneration into mere teaching-machines—*Unterrichtstechniker*, to quote again from Paulsen.

In America the relations of this part of the university to the rest offer many problems peculiarly pressing, because the individuals who compose these faculties almost without exception form a part of others as well—a condition entirely different from that existing in European universities. They generally have quite as much to do in an undergraduate as in the graduate school, and so are in a position analogous to that of the *Gymnasiallehrer* who also lectures in the university. The situation is, of course, largely, if not exclusively, the result of insufficient funds. No good “graduate school” could possibly be self-supporting, and the institutions of which these schools form parts have naturally many other demands to meet. The burden of double teaching weighs very heavily upon the American professor, making exceedingly difficult the necessary concentration of mind upon the higher work. To regulate these conditions is certainly one of the most important problems before the American university organizer.

To do this chosen work with the best result the universities must have well-prepared material. The need of this has been met by different nations in different ways. Least care has hitherto been taken in the United States, where until very recent years almost any one was thought well enough trained for admission to a school of medicine or law or technology. Germany has been the most careful, demanding until not long ago a gymnasial training for all faculties of the universities, and a full course in the *Realschule* for admission to the *technische Hochschule*. But even here, some years ago, a reaction set in against the exclusive privileges of the gymnasium, and now certain parts



of the university are open to the graduates of *Realschulen* and *Realgymnasien*. The end of the extension of privileges is not yet reached; the natural sciences will doubtless receive still greater concessions. But the principle is still firmly maintained that admission to professional training is to be denied to those who have not a rigid and thorough preliminary training. The kind of training may vary, but its amount and thoroughness may not be diminished. This is still an urgent need in America; not how the universities may get the largest numbers of students, or fill up the schools that "pay" the best, but to get a reasonable number of the best-prepared students, who will push on beyond their masters. Much has been written of late years about the undue prolongation of university, especially professional, study; and from this point of view what seems only a school question becomes a burning university question as well, for the university can build only upon the foundation of the school, or of the school and the college.

The best form of instruction for the university to follow is still a matter of discussion. Everywhere it is recognized that mere school methods do not suffice; the lesson to be learned, the *pensum*, the "recitation," to use an American term, has no proper place in university work. Even where a new subject is taken up, for example an Oriental language, this method is felt to be out of place. The lecture, on the other hand, which up to a few years ago held chief sway in the Continental universities of Europe and was thence imported into American colleges and universities, has been vigorously assailed. Why should students take down from the lips of a lecturer, the objectors say, things which they could find more quickly and satisfactorily in books? There is much force in the objection, and the lecture has lost much of its prestige. The seminar, and laboratory, and clinical work, under the direct guidance of an

instructor, have largely taken its place. Yet its usefulness is by no means gone. As a means of informing a number of students quickly of the latest developments of science its place cannot be taken by books, for purely practical reasons; the books cannot be printed quickly enough, nor could publishers be found to issue new editions every year, nor could the students be expected to buy as many books as this method would imply. Again, the personality of the teacher would be largely lost—and the personality of a really good teacher, his visible and communicable enthusiasm, are potent factors in the production of a satisfactory pupil. Undoubtedly much time can be saved by judicious use of printed bibliographical and other lists, and the lectures should be kept in close connection with seminar and laboratory work; but to abolish them entirely would mean an immense loss to university instruction. There is a certain freedom and flexibility in the lecture which make it particularly useful. It is thus eminently suited to advanced instruction, where a number of mature students have to be guided. It meets the needs which they have in common. On the other hand, the individuality of the advanced student must be maintained to the utmost; he must be shown how to work, but left to himself to apply the principles, with such criticism from his instructor as his application calls for, which is properly done in seminar, laboratory, or clinic. His selection of work must not be too closely limited, and he must be encouraged to strike out for himself. His *Lernfreiheit* must be guaranteed him.

It is manifestly impossible, within the limits here set, even to touch upon all the university problems of to-day. I have, therefore, attempted merely to indicate what seemed to me the all-important ones. In the prospects of this Congress we read: "The central purpose is the unification of knowledge, an effort toward which seems appropriate on

an occasion when the nations bring together an exhibit of their arts and industries." There is no field of human physical activity which might not find illustration among the exhibits, and no field of mental activity not provided for in the deliberations of this Congress; but more than this, there is nothing represented in either the Exposition or the Congress which may not properly be made the subject of university study.

Not only do the architect and the legislator build wiser, but also the poet often speaks truer, than he knows. Terence's

*homo sum: humani nil a me alienum puto*

has gained in the course of ages a deeper and truer meaning, probably far deeper than the poet ever intended it to bear, but a meaning and a truth from which mankind can never recede. So too the very word "university," which as originally used had no reference to the universality of human interest, but denoted merely the whole body of teachers and scholars of the *studium generale*, has earned the right to the wider sense now attached to it; it is becoming, and it is our duty to help it to become, a *panepistemon*, as the Greeks of to-day call it. Nothing that man can possibly find out is alien to him; not only to increase knowledge, but to multiply the fields of knowledge, is the peculiar province of the universities, which might well take as their motto that famous line. They are peculiarly called upon to take *all* research under their protection, to train for it, and to encourage its practice.



## THE LIBRARY—ITS PAST AND FUTURE

BY GUIDO BIAGI

[GUIDO BIAGI, Director of the Laurentian and the Riccardi Libraries of Florence. b. Florence, Italy, 1855. Ph.D. 1878, Istituto di Studi Superiori Pratici e di Perfezionamento, Florence; granted fellowship by the Board of Education for Italian literature. Assistant Librarian in the Victor Emanuel, Rome, 1880; First Vice-Librarian, by competition, in the National Library of Florence, 1882; Librarian in the Victor Emanuel, 1883; Chief of the Cabinet of the Secretary of Education, 1884; Librarian of the Marucelliana Library in Florence, 1886; Prefect of the Laurentian Library of Florence, 1889; Chief of the Cabinet of the Minister of Education, 1892; General Inspector of Public Instruction, 1893; Director of the Laurentian Library, 1895; Vice President of the International Library Conference, London, 1897; Director of the Riccardiana, annexed to the Laurentian Library, 1898; Hon. Professor of the Fine Arts Academy of Florence, 1897; Correspondent of the Royal Historical Society of Tuscany, 1887; Hon. Secretary of the Dante Society, 1887-1894; Hon. Treasurer of the Dante Society, 1899 until now; member of the Superior Jury, St. Louis Exposition, 1904. AUTHOR of *The Novelle Antiche* (Florence 1878); *The Mare Magnum of F. Marucelli* (Florence, 1888); *The Private Life of the Renaissance Florentines*; *The Last Days of P. B. Shelley*; *The Illustrations of Stradanus to the Divine Comedy*; *Aneddoti Litterari*; several publications of bibliography and library economy. EDITOR of *The Library Review* (Rivista delle Biblioteche e degli Archive).]

THE first founders of public libraries having been Italian, it will perhaps be neither strange nor unfitting that an Italian, the custodian of one of the most ancient and valued book-collections in the world, should speak to you of their past. He may, however, appear presumptuous in that he will speak to you also of their future, thus posing as an exponent of those anticipations which are now fashionable. It is in truth a curious desire that urges us and tempts us to guess at the future, to discover the signs of what it will bring us, in certain characteristics of the present moment. It answers to a want in human nature which knows not how to resign itself to the limitations of the present, but would look beyond it into time and space.

This looking forward toward the future is no selfish sentiment; it springs from the desire not to dissipate our powers in vain attempts, but to prepare new and useful material for the work of the future, so that those who come after us may move forward without hindrance or perturbation, without being obliged to overturn and destroy, before they can build up anew. Thus does it happen in nature: huge secular trunks flourish and grow green by luxuriant offshoots which add new vigor of life to the old and glorious stock.

We may perhaps discover the secret of the future of the library by looking back over its past, by attentively studying the varying phases through which it has passed in its upward path towards a splendid goal of wisdom and civilization. By thus doing we may prepare precious material for its future development and trace with security the line of its onward movement. It is of supreme importance that humanity in general, as the individual in particular, know whither its efforts must be directed, that there may be no straying from the straight path. We are sailors on a vast sea bound toward a shore we know not of; when we approach it it vanishes like a mirage from before our eyes. But we have as guides the stars which have already ruled our destinies, while before us flames, on the distant horizon, that light of the Idea toward which our ships and our hearts move eagerly. Let us stand firm at the helm and not despise the counsels of some old pilot who may perhaps seem faint-hearted to young and eager souls. He who is hurried along by the excitement of the course, by the impetuosity of the motion, finds neither time nor place to look back and to meditate, which is necessary, that he may look forward with sharper and calmer gaze. Modern life among the younger and more venturesome peoples is a giddy race. They run, they annihilate the space before

them, they press onward, ever onward, with irresistible impetus, but we cannot always say that this headlong course leads straight toward the goal. We are not sure, even, that it may not sometimes be running in a circle, a retracing of their steps. In mechanics a free wheel turning upon itself and moving no machinery is so much lost power. Let us beware of free wheels which consume without producing, which give the illusion of movement whilst they still remain stationary. Modern civilization bears within itself a great danger, the endeavor which loses the end by a misuse of the means, and which, though busy, is ever idle; idle, yet never at rest. It may be, therefore, that a momentary return to the past, with all that it can teach, will be useful to all of us.

Progress has rightly been compared to a continual ascent. Modern man sees before him ever vaster horizons; the eye of science discovers in the infinitely distant and in the infinitely small ever new worlds, whether of suns or of bacteria. In the same way do conceptions and ideas ever widen and tend to a more comprehensive generalization. All the march of civilization, both material and moral, consists in rising from a simple primordial idea to another more complex, and so on to the highest scientific abstractions. Woe to science if it stops short in the course of this evolution; its reputation would be injured beyond repair. In material things the fate of certain words shows us the great advance that has been made; the words are the same but the things they represent are very different. We still give the name of *casa* (*capsa*, that is, hut) to our splendid dwellings, which have here among you reached their highest point of development in your skyscrapers; we still give to the great transatlantic steamers, floating cities, the name of boats, which was once applied to the first rude canoes of the troglodytes. The first function of the *casa* and of

the boat still remains, but how differently are the details carried out. So also the book, the *liber*, whose etymology is preserved in the word library, was anciently the inner part of the tree (*liber*) on which men used to write, and which is now unfortunately again used in the making of paper no longer obtained from rags but from woody pulp. The libraries of Assyria and Egypt, those for instance of Assur-Bani-Pal and of Rameses I, consisted of clay tablets of inscribed stones or of papyrus rolls; the libraries of Greece, those of the Ptolemies and of the kings of Pergamos, the libraries of Rome, first opened to public use by the efforts of Asinius Pollio; the Byzantine libraries, which arose within Christian churches or in monasteries; and lastly, the rich and splendid collections made at great expense by the patrons, by the builders, of the culture of the Renaissance; all these, compared with the modern libraries, of which the most perfect specimens may be found in this land, are like an ancient trireme beside a twin-screw steamer. And the essential difference between the ancient and the modern library, between the conception of library as it existed up to the times of Frederic, Duke of Urbino, and of Lorenzo il Magnifico, and that existing in the minds of Thomas Bodley, or Antonio Magliabecchi, is to be found in the different objects represented by the same word, *liber*.

A study of the fate of this word would lead us step by step through the varying forms of the library, from those containing clay tablets, from those filled with rolls covered with cuneiform characters, to the codices brilliant with the art of Oderisi da Gubbio, splendid with gold and miniatures, to the first block books, to the printed books of Faust and Schöffer and of Aldo Manuzio, of William Caxton, and of Christopher Plantin.

The invention of printing caused a great revolution in the



world of books. The new art was, as we well know, received at first with scorn and indifference. The *incunabula* were but rough, vulgar things as compared with the beautiful manuscripts, clearly written on carefully prepared parchment, and glittering with brilliant colors. They were fit at most to be used by the masses—by women, by children, to be sold at fairs, to be put into the hands of clean-jacks and charlatans; but they were quite unfitted for the valuable collections guarded with so much care in perfumed cases carved from precious woods, in sculptured cabinets, on reading-desks covered with damask or with the softest of leathers, made from the skins of sucking animals. We can easily understand that fastidious art patrons such as the Duke of Urbino should scorn this new form of book, and should proclaim it unworthy of a place in a respectable library. But this tempest of scorn gradually subsided before the advantages which the new invention offered and before the marvelous progress it made. It sought, moreover, the favor of the miniaturists by leaving, in the margins of the new codices, sufficient space for ornamentations and for initials of burnished gold; it sought the favor and the help of the learned humanists by employing them to revise and correct the texts; it won the favor of the studious and of clerks, who have at all times been poor, by spreading abroad the texts of the classics, by offering for a few halfpence that which could at first be obtained only with gold or silver florins, by imparting to all that which had been the privilege of the few. And we must not forget the help given to typography by the invention of the minor arts, calcography and xylography, which added new value to the pages of the no longer despised book; so that printed codices (*codices impressi*) might stand side by side with the manuscript codices (*codices manuscripti*).

The word, the sign of the thought, first took on visible

form with the invention of the alphabet. But other ways of revealing thought were to be discovered in the future. No one in the ancient world, no one before the very culminating point of the Renaissance, could have supposed it possible that a library might contain anything but manuscripts; just as we, to-day, are incapable of imagining a library containing anything but books. We have seen that the conception of the book underwent expansion when printed books were added to those written by hand; and in the same way the library underwent expansion, gradually rising, between the fifteenth and the twentieth centuries, from a simple collection of codices, to the vast and wonderful proportions it has at present reached, assuming the duty of receiving within itself any kind of graphic representation of human thought, from clay tablets and inscribed stones and papyrus rolls, to phototypes and monotype or linotype products, from books for the blind written in the Braille alphabet to the new manuscripts of the typewriters.

From this brief compendium of bibliographical history one essential feature emerges. As though directed by an unswerving law, by the law of reproduction, human thought feels the necessity of expanding and of multiplying and perpetuating itself; and it is ever searching for new means of carrying out this intent. Thus the copyist or the scribe is replaced by the compositor, the miniaturist by the engraver, the draftsman by the lithographer, the painter by the color-printer, the engraver by the photographer and zincographer; thus the machine replaces the hand of man, the machine which is only concerned with working quickly, with producing as many copies as possible with diminished effort, with snatching her secrets from Mother Nature herself. We have replaced the *notae tironianae* of the Roman scribes by the typewriter, the wax tablets by the pages of

the stenographer; for drawing and painting we have substituted photography and three-color printing; wireless telegraphy has taken the place of messages sent by post-horses.

And not content with these singular and wondrous modes of reproducing graphically the thought and the word, we have found another means of reproduction still more stupendous in the immediateness of its action. Sound, the human voice, whose accents have hitherto been lost, may now be preserved and repeated and reproduced like other graphic signs of thought. When the graphophone was first invented we little thought that the cylinders upon which the vibrations of the voice had traced so slight and delicate an impression would ever be reproduced as simply as, by electrotyping, we reproduce a page of movable characters. Neither have we yet, or I am much mistaken, grasped the whole of the practical utility which the graphophone may have in its further applications and improvements. Up to the present time the graphophone has been kept as a plaything in drawing-rooms or in bars, to reproduce the last roulades of some well-known singer, the bangings of some military band, or the pretended uproar of some stormy meeting. At the present day the librarian would probably refuse to receive within his library this faithful reproducer of the human voice and thought, just as Frederic, Duke of Urbino, banished from his collection the first examples of printed books. But without posing as a prophet or the son of a prophet, we may surely assert that every library will, before long, contain a hall in which the disks of the graphophone may be heard (as already is the case at the Brera in Milan), and shelves for the preservation of the disks, just as the libraries of Assyria preserved the clay tablets inscribed with cuneiform characters. This is a new form of book, strange at first sight, but in reality simply a return

to ancient precedents, yet a return which marks the upward movement of progress.

An Italian Jesuit, Saverio Bettinelli, undertook toward the middle of the eighteenth century to give laws to Italian writers. He produced certain letters which he assumed Virgil to have written from the Elysian Fields to the Arcadia at Rome. In two of these twelve tablets, which he put forth under the names of Homer, Pindar, Anachreon, Virgil, Horace, Propertius, Dante, Petrarch, and Ariosto, in the poetical meetings held in Elysium, he laid down as a rule: "Let there be written in large letters on the doors of all public libraries: 'You will be ignorant of almost everything which is within these doors, or you will live three centuries to read the half of it;' and a little further on: 'Let a new city be made whose streets, squares, and houses shall contain only books. Let the man who wishes to study go and live there for as long as may be needful: otherwise printed matter will soon leave no place for the goods for the food, of the inhabitants of our towns.'"

This anticipation, which dates from 1758, still seems an exaggeration, but I know not whether, a century and a half hence, posterity will think it so, so great is the development of the industries, the succession of ever new inventions for preserving any graphic representation of human thought. Not even the life of Methuselah would be long enough to read as much as the tenth part of all that a modern library contains; and I know not whether we could invent a more terrible punishment than to insist upon this for our criminals. How many repetitions of the same ideas, how much superfluity, how many scientific works canceled and rendered useless and condemned to perpetual oblivion by those which succeed them! By welcoming everything, without discrimination, the modern library has lost its ancient and true character. No longer can we inscribe over its entrance

the ancient motto, "Medicine for souls;" few, indeed, of the books would have any salutary influence on body or on mind. Now that the conception of book and of library has been so enormously expanded, now that the library has become the city of paper, however printed, and of any other material fitted to receive the graphic representation of human thought, it will become more and more necessary to classify the enormous amount of material, to separate it into various categories. The laws of demography, whatever they may be, must be extended also to books; the dead must be divided from the living, the sick from the sound, the bad from the good, the rich from the poor; and cemeteries must be prepared for all those stereotyped editions of school-books, of catechisms, or railway time-tables, for all that endless luggage of stamped paper that has only the form of a book and has nothing to do with thought. *Sanatoria* must be provided for books condemned to uselessness because already infected with error or already eaten away with old age, and the most conspicuous places must be set apart for books worthy to be preserved from oblivion and from the ravages of time, either on account of the importance of their contents or of the beauty of their appearance. In this great republic of books the *princes principes* will stand high above the countless mass, and an aristocracy of the best will be formed which will be the true library within the library.

But even this will not have the exclusive character of the ancient library. It will receive divers and strange forms of books; next to a papyrus of Oxyrinchos, with an unknown fragment of Sappho, may be placed a parchment illuminated by Nestore Leoni or by Attilio Formilli, a graphophone disk containing Theodore Roosevelt's latest speech, or a scene from *Othello* given by Tommaso Salvini, the heliotype reproduction of the Medicean Virgil or

some phrases written on palm-leaves by the last survivor of a band of cannibals. The great abundance of modern production will render ever more rare and more valuable ancient examples of the book, just as the progress of industrialism has enhanced the value of work produced by the hand of man.

Thought as it develops is undergoing the same transformation which has occurred in manual labor; mental work also has assumed a certain mechanical character visible in formalism, in imitation, in the influence of the school or of the surrounding. Industrialism has made its way into science, literature, and art, giving rise to work which is hybrid, mediocre, without any originality, and destined, therefore, soon to perish. The parasites of thought flourish at the expense of the greater talents, and they will constitute, alas, the larger part of future bibliographical production. The greatest difficulty of future librarians will be to recognize and classify these hybrid productions, in choosing from among the great mass the few books worthy of a place apart.

The appraisal of literature which has already been discussed in books and congresses will continue to increase in importance; and in this work of discrimination we shall need the aid of critics to read for other men and to light up the path for those who shall come after. "The records of the best that has been thought and done in the world," said George Iles, "grow in volume and value every hour. Speed the day when they may be hospitably proffered to every human soul, the chaff winnowed from the wheat, the gold divided from the clay."

One of the special characteristics of the library of the future will be coöperation and internationalism applied to the division of labor. We may already see premonitory symptoms of this in the *Catalogue of Scientific Literature*

now being compiled by the Royal Society of London, in the *Concilium Bibliographicum* of Zürich, in the *Institut de Bibliographie* of Brussels, and in the *Card Catalogue* printed and distributed by the Library of Congress at Washington. This coöperation, however, will have to be more widely extended and must assert itself not only by exchanges of cards and of indices, but also by means of the lending of books and manuscripts, of the reproduction of codices or of rare and precious works. The government libraries of Italy are united under the same rules and correspond with all institutions of public instruction and with several town and provincial libraries, with free postage, so that books and manuscripts journey from one end to the other of the peninsula, from Palermo to Venice, without any expense to those who use them, and the different libraries of the state become, in this way, one single library. And so the day will come when the libraries of Europe and of America and of all the states in the Postal Union will form, as it were, one single collection, and the old books, printed when America was but a myth, will enter new worlds, bearing with them to far-off students the benefit of their ancient wisdom. The electric post or the air-ships will have then shortened distances, the telephone will make it possible to hear at Melbourne a graphophone disk asked for, a few minutes earlier, from the British Museum. There will be few readers, but an infinite number of hearers, who will listen from their own homes to the spoken paper, to the spoken book. University students will listen to their lectures while they lie in bed, and, as now with us, will not know their professors even by sight. Writing will be a lost art. Professors of paleography and keepers of manuscripts will, perhaps, have to learn to accustom their eye to the ancient alphabets. Autographs will be as rare as palimpsests are now. Books will no longer be read; they

will be listened to; and then only will be fulfilled Mark Pattison's famous saying: "The librarian who reads is lost."

But even if the graphophone does not produce so profound a transformation as to cause the alphabet to become extinct and effect an injury to culture itself; even if, as we hope will be the case, the book retains its place of honor, and instructions through the eyes be not replaced by that through the ears (in which case printed books would be kept for the exclusive benefit of the deaf), still these disks, now so much derided, will form a very large part of the future library. The art of oratory, of drama, of music, and of poetry, the study of languages, the present pronunciation of languages and dialects, will find faithful means of reproduction in these humble disks. Imagine, if we could hear in this place to-day the voice of Lincoln or of Garibaldi, of Victor Hugo or of Shelley, just as you might hear the clear winged words of Gabriele d' Annunzio, the moving voice of Eleonore Duse, or the drawling words of Mark Twain. Imagine the miracle of being able to call up again the powerful eloquence of your political champions, or the heroes of our patriotic struggles; of being able to listen to the music of certain verses, the wailing of certain laments, the joy that breaks out in certain cries of the soul. The winged word would seem to raise itself once more into the air as at the instant when it came forth, living from the breast, to play upon our sensibilities, to stir up our hearts. It is not to be believed that men will willingly lose this benefit—the benefit of uniting to the words the actual voices of those who are, and will no longer be, and that they should not desire that those whose presence has left us should at least speak among us.<sup>1</sup> We may also believe that certain forms of art, such as the novel and the drama, will

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<sup>1</sup> A *Phonographic Pantheon* has been founded in the Laurentian Library, according to this proposal.



prefer the phonetic to the graphic reproduction, or at least a union of the two. And the same may be said of poetry, which will find in modern authors its surest reciters, its most eloquent interpreters. The oratory of the law-court and of the parliament, that of the pulpit and of the *cathedra*, will not be able to withstand the enticement of being preserved and handed on to posterity, to which their triumphs have hitherto sent down but a weak, uncertain echo. "I shall not die altogether"—*Non omnis moriar*—so will think the orator and the dramatic or lyric artist; and the libraries will cherish these witnesses to art and to life, as they now collect play-bills and lawyers' briefs.

But internationalism and coöperation will save the future library from the danger of losing altogether its true character by becoming, at it were, a deposit of memories or of embalmed residua of life, among which the librarian must walk like a bearer of the dead. The time will come when, if these mortuary cities of dead books are not to multiply indefinitely, we must invoke the authority of Fra Girolamo Savonarola, and proceed to a burning of vanities. A return to ancient methods will be a means of instruction, and those centenary libraries which have preserved their proper character, which have not undergone hurtful augmentations, which have reserved themselves for book and manuscripts alone, which have disdained all the ultra-modern rubbish which has neither the form nor the name of book,—these libraries will be saluted as monuments worthy of veneration. And then some patron who, from being a multi-millionaire, as was his far off ancestor, will have become at least a multi-billionaire, will provide here in America for the founding of libraries, not of manuscripts, which will no longer be for sale, but of reproductions of codices in black or in colors; and we shall have libraries of facsimiles most useful for the study of the classics, just as we now have museums of casts for the study of the plastic arts.

The application of photography and of photogravure to the reproduction of texts which are unique rather than rare, makes it possible for us not only to have several examples of a precious codex or manuscript, but to fix the invisible deterioration which began in it at a certain date, so that, as regards its state of preservation, the facsimile represents an interior stage to the future state of the original. By thus wonderfully forecasting the future, these reproductions render less disastrous the effects of a fire such as that which lately destroyed the library of Turin. They have, therefore, found great favor among students and have excited the attention of the most enlightened governments. If the means for carrying on what have hitherto been but isolated efforts do not fail, if generous donors and institutions and governments do not deny their aid, we might already begin a methodical work of reproduction, and come to an agreement concerning the method of fulfilling a vast design which should comprehend all the most precious archetypes of the various libraries in the world, those which are the documents of the history of human thought and which are the letters-patent of the nobility of an ancient greatness. This, I think, would, nay should, be the most serious and principal duty assumed by the library of the future: to preserve these treasures of the past while hoping that the present and the future may add to them new ones worthy of public veneration. Think how vast a field of work, to seek through all nations the autographs or archetypes to which have been intrusted the thought of great men of every age and of every race, and to reproduce them in the worthiest way and to explain them so as to render them accessible to modern readers. Thus should we form the true library of the nations which, with the facsimiles, would bring together the critical editions of their authors and the translations and the texts made for the explanation of the

works. But the first and most urgent duty would be that of making an inventory, an index, of what should constitute this collection; and, first of all, we should know and search out such authors as may have influenced the history of the human race by their works in all times and among all peoples; and we should have to find the venerable codices which has handed on to us the light of their intellect, the beating of their hearts. Every nation which is careful of its own glory should begin this list, just as we are now beginning that of the monuments of marble or of stone which have value as works of art. We should thus begin to prepare the precious material to be reproduced, while at the same time it would be possible to calculate the expense needed for carrying out the magnificent design. The Belgian Government has appointed a congress to meet at Lieges next year for this purpose, but its programmes are too extended; for they take in also the documents in the archives and in the musuems. More opportune and practical would be an inquiry affecting the libraries alone and beginning with oriental and classical authors, with those who represent the wisdom of the ancients. Thus the library of to-day would gradually prepare its work for the future library, which will surely want something more than the editions, however innumerable, supplied to it by the bibliographical production of the years to come.

Internationalism will also be able to render great services to science, in the field of photo-mechanic reproductions, if it find a way of directing them to some useful goal, and if it prevent them from taking a merely material advantage of the precious collections which every nation is justified in guarding with jealous care. Photography with the prism, which has no need of the plate or of the film, costs so little and is so easy of execution, especially if the process of the late Mlle. Pellechet be adopted, that one can, in a few hours,

carry away from a library the facsimile of an entire manuscript. No doubt many learned men of the new style find it more convenient to have these collections at their own house instead of wandering from one library to another to collect them at the expense of their eyes, their patience, and their money. To be able to compare the various texts and to have the various readings of them under one's eye is an inestimable benefit; but the true philologist will never be contented with simply studying these facsimiles, however perfect they may be; he will want to examine for himself the ancient parchments, the time-yellowed papers, to study the slight differences between the inks, the varieties in the handwritings, the evanescent glosses in the margins. In the same way an art critic is not content with confining his study simply to the photographs of pictures, but he observes the pictures themselves, their patina, their coloring, their shadows, their least graduations of tones and half-tones. In the same way, too, a musician would not presume to the knowledge of an opera which he had only studied in a pianoforte arrangement. If this manner of shunning fatigue took root, our splendid collections of manuscripts would no longer be the goal of learned pilgrims, but would become the easy prey of the photographer, who would certainly embark upon a new speculation—that of retailing these collections to the manifest injury of the libraries and of the states, which would thus lose the exclusive literary and artistic possession of what is a national glory. Meanwhile a wise jurisdiction will avoid these dangers without injuring or hindering studies and culture. We shall adopt for manuscripts, which excite other people's desires, the proposition made by Aristophanes in the *Ecclésiastuse* (that charming satire on socialism) to bridle the excesses of free love. We shall permit a man to have a copy of a manuscript when he has first had one of another

and older manuscript and when the latter, which is about equal in value to the first, has already been given up to the library, which will thus lose none of its property. "I give to make you give,"—*Do ut des*,—base and foundation of international treatises for customs duties must be applied also in a reasonable manner to the intellectual traffic that will be the characteristic of future civilization, which will never permit one nation to grow poor while another grows rich, and will insist that wealth be the bearer of equality and fruitful in good. A well-regulated metabolism, as it insures the health of our organic bodies, will also serve to maintain the health of that great social body which we all desire and foresee, notwithstanding political struggles and the wars which still stain the earth with blood. When the time comes in which we shall be able to use for ideal aims the millions which are now swallowed up by engines of war, of ruin, and of assault, the library will be looked upon as the temple of wisdom, and to it will be turned far more than at present the unceasing care of governments and of peoples. When that time comes, the book will be able to say to the cannon, with more truth than Quasimodo to *Notre Dame de Paris*, "This has killed that"—*Ceci a tué cela*—and it will have killed death with all her fatal instruments.

But another and a more important aspect of scientific internationalism which will preserve the library of the future from becoming a bazaar of social life, will be the importation of the most wholesome fruits of ancient wisdom collected with wonderful learning by the great scholars of the seventeenth and eighteenth centuries, the first founders of libraries, men who attempted an inventory of human knowledge. During the seventeenth and eighteenth centuries, hitherto looked upon by experimental science with disdain, was collected with laborious detail all the learning of past centuries,—that of the holy books of the oriental

world, that which the fathers of the Church, and after them the Arabs, and later on the Encyclopedists of the Middle Ages, and then the astrologists, and the alchemists, and the natural philosophers, condensed into encyclopedias, into chronicles, into treatises, into all that congeries of writings which formed the libraries of the Middle Ages and of the Renaissance, into that infinite number of printed books, which still fill the ancient and classical libraries of Europe with voluminous folios and quartos. The desire of classifying and bringing into line all human knowledge, of reading this immense amount of material and gaining a thorough knowledge of it, armed those first solemn scholars with patience, formed those legendary librarians who, like Antonio Magliabecchi or Francesco Marucelli themselves, were living libraries. The Latin anagram of the celebrated founder of the Florentine library, Antonio Magliabecchi, is well known: "This, one large library"—*Is unus bibliotheca magna*; but it may be, and at that time also could be, equally applied to the others. These devourers of books were the first inventors and asserters of the scientific importance of a card catalogue, because armed with cards they passed days and nights in pressing from the old books the juice of wisdom and of knowledge and in collecting and condensing it in their miscellany, in those vast bibliographical collections compared with which the catalogue of the British Museum is the work of a novice. They not only appraised the known literature of their time, but they classified it; not by such a classification as we make now, contenting ourselves with the title of the book, but by an internal and perfect classification, analyzing every page and keeping record of the volume, of the paragraph, of the line. The skeleton of the encyclopedia, of the scientific dictionary, which at the end of the eighteenth century underwent, in France, a literary development, may be found

within these bibliographical collections now forgotten and banished to the highest shelves of our libraries. Any one who has looked through and studied one of these collections as I have done, has wondered at the treasures of information, of learning, of bibliographical exactitude, which are contained in those dusty volumes. Above all, the precision of the references, and of the quotations, the comprehensiveness of the subjects and of the headings, render them, rather than a precious catalogue, an enormous encyclopedia, to which we may have recourse not only for history, for geography, for literature, for all moral sciences, but also, impossible as it may seem, for natural sciences, for medicine, and for the exact sciences. Incredible is the number of quotations made for even the least important subject; incredible, too, is our ignorance, our stupid disdain for this emporium for out-of-the-way information. Were you to study the article "Fever," you might perhaps find a hint at its propagation by means of mosquitoes, just as I, studying the geography of Ethopia, came across mention of those gold-mines which have just lately been found again in Erythrea. Modern science, less presumptuous than that of a short while ago, which had shut itself up in the dogmas of materialism, will not disdain to visit these springs, and to compile an encyclopedia of the knowledge of the ancients, with quotations drawn from these true wells of science.

In the library of the future, classified on the decimal system, or Cutter's expansive, every section should contain a shelf of cards on which should be collected, arranged, verified, and even translated this ancient material, which may throw light on new studies and on new experiments; for the empirical methods of our forefathers, like tradition and legend, have a basis of truth which is not to be despised. Meanwhile the modern library, which in this land pros-

pers and exults in a youth strong and full of promise, should collect this material, and thus spare the students at your universities the long researches needed to assimilate the ancient literature of every subject. The modern library, the American library, would not need to acquire and accumulate with great expense all the ancient mass of human knowledge in order to make use of the work of past generations; it need only collect the extract of this work, opportunely chosen, sifted, classified, and translated. This would be an immense advantage to its scholars, and the internationalism of science, of whose certain advent I have spoken to you, would find in this first exchange, in this fertile importation, its immediate application. Why should students and specialists be sent to begin new researches in learned and dusty volumes, when this work already has been done by the great champions of erudition in their miscellany, in their bibliographical encyclopedias? Let us rather try to spread abroad a knowledge of this treasure, this well of science; let us publish information about it; let us draw largely from its pure and health-giving waters. You will not be without guides who will lead you to it, who can and will give you to drink of its fresh waters. Thus shall those noble and solitary spirits who worked unknown in the dark of the seventeenth century and in the wan eighteenth century, be joined, by an invisible chain, to the vigorous intellects which, in the last century and in that upon which we have just entered, are working, are toiling, in the diffused light of civilization, and will continue to work and will continue to toil for science, for humanity.

And the card, the humble card, the winged arrow of the librarian and of the student, will fly from continent to continent, a messenger of knowledge and of concord.



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The *Life of Edwards* by Thomas Greenwood, 1902, is an almost indispensable appendix.

The *Report on Public Libraries in the United States*, 1876, is important both for its historic information and as a contribution to library science.

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enumeration of works relating to general and special bibliography, and if not complete, show that an immense amount of work has been done. To this class belong the *Bibliographie des Bibliographies*, of Léon Vallée, 1883-87, and the *Register of National Bibliography*, by W. P. Courtney, 1905.

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Much information as to libraries and catalogues is to be found in periodicals, such as, the *Serapeum*, *Centralblatt für Bibliothekwissenschaft*, *Library*, *Library Association Record*, *Library Journal*, Petzhold's *Anzeiger*, *Polybiblon*.

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## CHARACTERISTICS OF THE COMMON LAW

BY NATHAN ABBOTT

[NATHAN ABBOTT, Professor of Law, Leland Stanford Jr. University, since 1894. b. July 11, 1854, Norridgewock, Maine. A.B. Yale; LL.B. Boston; Professor of Law, University of Michigan, 1891-92; *ibid.* Northwestern University, 1892-94.]

DURING the three centuries prior to Lord Coke the common law of England in some way or other gathered itself together out of custom and differentiated itself from other legal systems so far as to have gained a name and home—the common law of England. It was the great intellectual achievement of a people large enough and strong enough to have ideas of its own, and isolated and individual enough to develop those ideas in its own way. In the three centuries subsequent to Lord Coke its child in America has lived and grown after the manner of its kind, but it has not yet gained a new name, although it has a new home. It is the common law of England in America—the common law of England plus those slow accretions and changes that were inevitable where a free and expanding people expressed their jural needs. This is also the great intellectual achievement of the American people; in the eighteenth century its one intellectual product, in the nineteenth century its greatest intellectual product.

The common law in both countries in its beginning was the expression of a free people's needs and standards of justice, and was not essentially different in its nature from their needs and standards as expressed in art or in literature. And the common law being the product of a free people is a living institution possessed, not only of a vital and conservative, but also of an assimilative and progressive power.

The vicissitudes of parent and child exemplify what such a living institution can endure. But law as a living institution is not as stable as living matter. A cross-section of a tree at its base is not essentially different from one made one hundred feet from its base. A cross-section of the common law at one time is not necessarily like one made at an earlier or later time. Its nature changes with the national views of that on which law rests. This in part explains the difficulties encountered in defining law. What at one time is custom at another time is law, and yet each will have a like compelling force.

The purpose of this paper is to give some account of the fundamental characteristics of the common law at two somewhat widely separated periods and to contrast them. One period is that of the common law in the time of Lord Coke, the other the common law in America at the present day. The periods are separated by three centuries, or those of the common law in sixteen hundred and in nineteen hundred. The period with Lord Coke is selected because during his time the jurisdiction of the common law courts was defined, limits to the royal prerogative set, and chancery made a court of ordinary jurisdiction for equity; and because this was the time of the beginning of colonization in America. The common law of Lord Coke was the common law of Winthrop and Smith.

Like other forms of thought manifested in literature, the common law is the product of influences that can be discovered and whose effects can be traced. These influences may be called direct, if exercised by the people or the judges, and indirect if occasioned by forces operating on the people or the judges. A body of law which starts with the proposition that it is the custom of the people soon arrives at the stage where the solution of legal questions calls for the aid of either outside systems or reason. Ac-



### THE MODERN RIGHTS OF MAN

*Photogravure from the Painting by Charles Landelle*

The famous allegorical painting reproduced here was originally exhibited at the Paris Exposition of 1889. The young man with his newly formulated "Rights of Man" (*Droits de l'Homme*) embodies the spirit of the French Revolution of 1789, which proclaimed these "Rights" ignoring the majesty of the Law and ignoring also that there can be no rights without duty and self-restraint. France learned to her sorrow after all the turmoil and blood-hed of the Revolution that the whole social system is founded on the rights of the whole community and on the duties and obligations we owe to each other.







ording as the people or the legal profession applying this reason or deductions from the outside system have been the more concerned in law-making, the characteristics of the law have been popular or technical and conservative or progressive. It is therefore necessary, if we would discover the characteristics of the common law, to say something of the influences that contributed to shape it prior to Lord Coke; then to note its characteristics in his day; and then to speak of the influences that operated in America to influence its unwritten law, and to note its characteristics so far as they are disclosed by certain resemblances in the law of the several states.

Of the external influences, the canon and the civil law were most potent and operated upon the common law by way of compression rather than repression. Apprehensions of those systems and contentions with them intensified the loyalty of the English people for their own system. The power of the advocates of the canon and civil law in the universities, combined with the location of the courts at Westminster, tended to develop the schools of common law in the Inns of Court. The decline of the local courts with the growth of courts at Westminster made them less responsive to and expressive of popular needs, and may have impaired the popular regard for the common law. How far the oft-quoted phrase in the Statute of Merton justifies wide generalization, it is not easy to say. But the influence of the Inns of Court would seem inevitably to substitute a professional for a popular standard of justice. The concentration in those Inns of a body of specialists, who for years dealt with problems, worked out in moots, in the halls, and in arguments in court under the scholastic training of the century before Lord Coke, must have developed a body of logicians and a legal system founded on logic. In the Inns of Court, like bees in a hive, the lawyers

secreted the law of England. It was no longer the custom of the people, although so described, but a highly technical law. That the written law and the pleadings were expressed in Latin or French would also tend to restrict its expression to lawyers. These influences would tend to impair the close relation of the people to their law that early had existed. The introduction of a technical procedure which under the hand of the professional lawyer would tend to be an end rather than the means would be misunderstood by the people. Authorities given in Parke's *History of Chancery* show considerable evidence in the statutes and in the debates in Parliament that the common people were discontented with the common law and its professors. But the lawyers were calling their handiwork the perfection of reason. The pages of Coke and Plowden abound with cases that are in no way related to the customs of the people. As Professor Gray says, "With a great part of the law the customs of the people have obviously had nothing more to do than have the motions of the planets. The enormous mass of the law of pleading and of evidence has been born and bred within the four walls of a court. The community at large, those who make custom, know absolutely nothing about it. So with a great part of those legal rules which are not plainly of an ethical character. For instance, the rule in *Shelly's Case*, is that a product of the 'common conscience of the people'; or the rule that 'dying without issue' means an indefinite failure of issue; or is the rule that a parol promise without consideration cannot be enforced a spontaneous evolution of the popular mind?" ("Definitions and Questions in Jurisprudence," 6 *Harvard Law Review*, 21-32, 1892.) It is evident, then, that the change from popular to professional factors occasioned by external pressure and internal development have affected the fundamental characteristics of the common law.

In the growth of the sovereign power and the legislative, judicial, and ecclesiastical elements of society each has exalted its powers and extended its frontiers. There comes a time when the last meet and tend to overlap. The controversies engendered in adjusting the powers and defining the frontiers have created the larger part of constitutional law, the province of legislation, and the jurisdiction of courts. The common law was affected in its scope by the controversies of its judges with canonists and chancellors. And the content of the law was modified by the struggle between the different courts for litigants and preëminence.

There are two forces having their source in national traits which contributed to shape English law; one is the liking for fair play and the natural turn of mind for litigation that is found in the English people. By this is meant something more than a fancy for contention and technicality; rather the right settlement of disputes in an orderly and judicial way. Perhaps at this day it may be difficult to affirm that this is a cause or an effect from such masterful hands as those of Henry II. But the reliance on courts has tended to the development of law and the independence of the judge. It is of this that Lieber says, "It is a great element of civil liberty and part of a real government of law which in its totality has been developed by the Anglican tribe alone. It is this portion of freemen alone on the face of the earth which enjoys it in its totality." (Civ. Lib. and Self-Govt., p. 203.) The other is a respect for authority deep-seated in the English people, a respect arising either from position or age. This in part explains why precedents have such a hold on the courts, and its lack is one of the facts to be noted in America. It has been said that the reliance on precedents is due to an incapacity in the English to reason generally. Commenting on the arguments in the debates on impositions in 1610, in which we find an early

and remarkable use of precedents, Mr. Gardner says, "The speakers on both sides seemed to have had a horror of general reasoning." (2 Hist. of Eng. 75.) De Tocqueville noted this trait in Englishmen and its absence in Americans, and devotes a chapter to "Why the Americans show more aptitude and taste for general ideas than their forefathers, the English." (Dem. in Am. vol. II, chap. 3.) It will be instructive to follow the Japanese in their jural growth under a French code with their seeming natural capacity for generalization, but with their present tendency to disregard precedent excepting for illustration. (See address of Dr. Rokuichino Masujima before N. Y. State Bar Ass'n, 1903.) The other aspect of authority arising from age is commented on by Mr. Gardner in connection with the same impost debates, "Our ancestors did not refer to precedents merely because they were anxious to tread in the steps of those who went before them, but because it was their settled belief that England had always been well governed and prosperous. They quoted a statute not because it was old but because they knew that, ninety-nine times out of every hundred, their predecessors had passed good laws." Lord Ellesmere in *Calvin's Case*, quoting from the Year-Books, said, "Our predecessors were as sage and learned as we be." In connection with precedent in the time of Coke it is to be noted that during the reign of Elizabeth the printing-press was busy reproducing law-books. The labors of Tottell made the Year-Books a "profitable and popular literature." (See Soule, "Year-Book Bibliography," 14 Harvard Law Review, 563, 564.) There were editions of all the treatises, and these with the abridgments opened up the past and ancient laws to the professional students in the Inns in a new and forceful way.

In trying to describe the fundamental characteristics of the common law I appreciate that it will be difficult to say

anything that is not trite or commonplace. To obviate this in part I shall select a case in the time of Lord Coke, and with it endeavor to illustrate such characteristics as seem to me fundamental. The case chosen is Calvin's. It was an exceptional case, interesting in itself and for what it discloses by inference. It also is a convenient case because of its relation to the American colonists, and for its effect upon the political debates of the middle of the eighteenth century.

From the meeting of the crowns of Scotland and of England in James I arose the question whether the *post-nati*, or those born in Scotland after the accession of James to the crown of England, were aliens in England. A proclamation of James directly answered this in the negative. Commissioners of both countries proposed to the Parliaments of both countries that the common law of both nations should be declared to be that all born in either nation since James was king of both were mutually naturalized in both. The House of Lords and ten out of twelve of the judges of England supported this view. But the Commons would not assent to declare that the common law was as proposed. It was therefore determined to bring the question before the courts. For this purpose land was bought in London in the name of one miscalled Calvin, an infant born in Scotland since the accession of James to the English throne, and a suit was brought in Calvin's name in the King's Bench to gain possession of the free-hold. And a bill was brought in Chancery for detainer of the title-deeds. A demurrer in both cases raised the question in each case whether the plaintiff being an alien born be disabled to bring any real or personal action for land within England. After argument in the King's Bench, both cases were adjourned into the Exchequer Chamber, and there argued by counsel and all the judges of England and Lord

Chancellor Ellesmere. The Lord Chancellor and twelve out of the fourteen judges decided the demurrer in favor of the plaintiff on the ground that, having been born since the accession of James, he was not an alien in England.<sup>1</sup>

The first characteristic illustrated by Calvin's Case is that the common law deals with facts.

Under some systems a hypothetical question can be presented to the judges. In Calvin's Case one might have been framed generally: Is a person born in Scotland since James I became King of England an alien in England? But such a proceeding is not possible by the common law. It was necessary to present to the judges the facts of a real case. There must be parties before the court before it will act. And without them and a specific question to decide, all the utterances of the court are obiter. Bacon said in his argument, "The case is no feigned or framed case, but a true case between two parties." Legislation is an endeavor to find an answer to an indefinite number of hypothetical cases. The courts endeavor to find an answer to a single concrete case that has arisen in the past. This characteristic of common law has the inconvenience that a point of law may long be uncertain for lack of parties willing to litigate it. It is especially inconvenient in America, where the constitutionality of a statute remains to be determined until litigation arises. But this inconvenience has not occasioned any change in the theory of the common law.

Dealing with facts alone, the common law does not judge of unexpressed thoughts, theories, or opinions. The years before Calvin's Case was decided, Lord Coke wrote, "The Lords of the Council of Whitehall demanded of Popham,

<sup>1</sup> Calvin's Case is reported in 7 Rep. 4a (1608). The arguments in committee in 1606 in Moore, p. 790; and both of these, with the argument of Bacon, Solicitor-General, counsel for Calvin, in the Exchequer Chamber, and Lord Chancellor Ellesmere's opinion in the Exchequer Chamber, are in 2 How. State Trials, 559-695.

Chief Justice, and myself, upon motion made by the Commons in Parliament, in what cases the Ordinary may examine any person *ex-officio* upon oath; and upon good consideration and in view of our books, we answered to the Lords of the Council at another day in the Council Chamber, that 'No man ecclesiastical or temporal shall be examined upon secret thoughts of his heart, or of his secret opinion; but something ought to be objected to against him which he hath spoken or done.' " (Oath *Ex-Officio*, 12 Rep. 2629 [1607].)

A second characteristic of the common law is its adaptability within rigid limits. "The most distinctively English trait of our medieval law is its 'formularly system' of actions." (2 P. & M. Hist. E. L. 556.) Lord Ellesmere touches upon the elasticity of the ancient common law where in the case of need a new writ could be framed in Chancery so that no one need depart without remedy. But it was now the "closed cycle of original suits, the catalogue of forms of action to which naught but statute could make addition." (Mait. Ed. Bract. N. B. vol. 1, p. 6.) "It were better to live under a certain known law though hard sometimes in a few cases than to be subjected to the alterable discretion of any judge," said Chief Justice Popham in commendation of the law of England in his opinion before the Lord's Committee. (2 How. St. Tr. 569.) The litigant could choose a definite weapon, but at his peril. The judges were passive if he erred. "That is part of the fundamental methods of the common law; the party can have the law's help only by helping himself first. On these terms and not otherwise it is open to all." (Sir Frederick Pollock, "Ex. of the Common Law," 14 Col. Law Rev. 20.) The courts did not necessarily initiate proceedings even in the case of crimes. In legal controversies the choice of weapons was large, and within their limits the common law

could deal with any matter, simple or complex, and with any party, whether single or many, and could reduce all litigation to the simple formula, Command A that without delay he render a certain thing to B or do full right to B. Calvin's Case neatly illustrates this adaptability. By a writ of assize and a demurrer the whole matter was capable of consideration and settlement.

A third characteristic of the common law is its generality. No one was above the law, and every man, whatever his rank, under the same circumstances, was subject to the same law and in the same courts. The ancient law has been stated in the thirteenth century in the Statute of Marlborough (1267): "All persons as well of high as of low estate shall receive justice in the King's Courts." Of this Coke says (2 Inst. 103), "This is the golden metwand that the law appointeth to measure the cases of all and singular persons, high and low, to have and receive justice in the King's Courts." His added words, "For the King hath distributed his judicial power to several courts of justice, and courts of justice ought to determine all causes and that all private revenges be avoided" (see also 4 Inst. 71), suggest Sir Frederick Pollock's generalization, not wholly in point in this connection, but conveniently noted here, "The King's Courts, at the outset of their career, came under a rule which we shall find to run through the whole of our legal history and never to have been neglected with impunity. It may be expressed thus: Extraordinary jurisdiction succeeds only by becoming ordinary. By this we mean not only that the judgment and remedies which were once matters of grace have become matters of common right, but the right must be done according to the fundamental ideas of English justice." ("Expansion of the C. L." 14 Col. L. Rev. 17.) King James claimed that he had not delegated all his powers as a law-giver. Lord



Ellesmere argued that his proclamation controlled Calvin's Case, summarizing it as follows: "So now if this question seems difficult, that neither direct law, nor examples, nor precedents, nor application of like cases, nor discourse of reason, nor the grave opinion of the learned and reverend judges, can resolve it, here is a certain rule, how both by the civile law and the ancient common lawe of England it may and ought to be decided; that is, by a sentence of the most religious, learned, and judicious King that ever this kingdom or island had." (2 H. St. L. 693.) Lord Ellesmere again argued on the same line two years later in the Case of Proclamations. (12 Rep. 74.)

One other point needs to be referred to. James, the year prior to Calvin's Case, had claimed that "the judges were but the delegates of the King, and the King may take what causes he should please to determine, from the determination of the judges and may determine them himself." (12 Rep. 63.) But the common law has settled that the judges are more than delegates, and that power once imparted to them will not return to the King.

A fourth characteristic of the common law is that the proceedings in the courts are public. In this regard there was a distinction in Lord Coke's time between criminal and civil proceedings. Of the former it may be said that when the colonists came to America a prisoner was kept in confinement more or less secret till his trial and could not prepare for his defense. He had no counsel either before or at the trial. At the trial there were no rules of evidence as we understand the expression, and the accused could not call witnesses in his own behalf. (1 Stephens's Hist. Crim. Law of Eng., 350.) But of civil cases, as Lord Coke said, "All causes ought to be heard, ordered, and determined before the judges of the King's Court openly in the King's Courts, whither all persons may resort, and in no

chambers or other private places; for the judges are not judges of chambers, but of courts, and therefore in open court where the parties' counsell and attorneys attend, ought orders, rules, awards, and judgments to be made and given, and not in chambers and other private places, where a man may lose his cause, or receive great prejudice, or delay in his absence for want of defense. Nay, the judge that ordereth or ruleth a cause in his chambers, though his order or rule be just, yet offendeth he the law because he doth it not in court." (2 Inst. 103.)

It is not merely for the public good that the English secured a public trial for civil and criminal causes, inestimable as is this feature of the common law. But all proceedings must be open; in some cases they are too open. But the general advantage outweighs this defect. But there is another aspect to this subject, namely the educative. The educational advantage to the public I consider trifling in civil cases. But the educational advantage to the bar and to students is well stated by Coke. "It is one amongst others of the great honours of the common law that cases of great difficulty are never adjudged or resolved *in tenebris* or *sub silentio suppressis rationibus*; but in open court and there upon solemn and elaborate arguments, by counsel learned of either party; and after that at the bench by the judges, where they argue seriatim upon certain days openly and purposely fixed, declaring at large the authorities, reasons, and causes of their judgments and resolutions in every such particular case (*habet enim necessio quid energiae viva vox*); a reverend and honorable proceeding in law, a grateful satisfaction to the parties, and a great instruction and direction to the attentive and studious hearers." (9 Rep. Pref. p. 38.)

A fifth characteristic of the common law is that in deciding questions of law the judges are controlled by statute;

in the absence of statute, by precedents or custom; and in the absence of both, or if the precedents conflict, by their own reason. No reported case up to this time so fully discusses this proposition as Calvin's Case; no more novel case could be devised. "The case is rare and new," said Lord Ellesmere. It was admitted on all hands that it was a case of first impression. Lord Coke spoke of it as being "Such a one as the eye of the law, our books and book cases, never saw; as the ears of our law (our reporters) never heard of; nor the mouth of the law, for *judex est lex loquens*, the judges, our forefathers of the law never tasted; I say such a one as the stomach of the law, our exquisite and perfect records of pleadings, entries, and judgments, never digested." (7 Rep. 4a.)

It will be instructive to examine Calvin's Case with reference to two points, one, its treatment of the law of nature, the other the source to which lawyers in the time of Coke could look for a standard of justice in the absence of precedent.

In committee in the House of Commons Sir Edwin Sandes showed that this case was proper to be consorted with the law of nations which is called "*jus gentium*"; for there being no precedent for it in the law "*lex deficit*" and "*deficiente consuetudine recurratur ad rationem naturalem*" and "*deficiente lege recurritur ad consuetudinem*," which *ratio naturalis* is the law of nations, called *jus gentium*. (Moore, 790; S. C. 2 How. St. Tr. 563.)

By "*ratio naturalis*" Sir Edwin meant natural law, using the term to signify "common sense" as explained by Mr. Brice. (Essays in Juris. p. 587.) In the argument in Exchequer Chamber, Bacon, Solicitor-General, said that the common law was founded on and favored by the law of nature; that all civil laws are to be taken strictly where they abridge the law of nature; and that as by the law of

nature all men are naturalized one toward the other, the presumption was that Calvin by the law of nature was not an alien in England. Bacon uses the term law of nature in the sense of natural or physical law and not in the sense used by Sandes.

The Lord Chancellor evidently had heard the argument of Sandes, for he says, "It is truly saide by a learned gentleman of the lower house, '*deficiente lege recurrendum est consuetudinem deficiente consuetudine recurrendum ad rationem.*'" (2 How. St. Tr. 672.) But Lord Ellesmere's conclusion is that the reason to which one finally must resort is not "the collective reason of civilized mankind," but that found only in those having four special qualities; namely, age, learning, experience, and authority to speak. (2 How. St. Tr. 686.) Lord Ellesmere has departed now from the theory of the law of nature of Sandes to that theory which treats natural reason as reason of the expert. Lord Coke disapproved of the proposition of Sandes which he put in the form that, for want of written law and of precedent, we are driven to reason, commenting upon it as follows: "If the said imaginative rule be rightly and legally understood, it may stand for Truth; for if you intend *ratio* for the legal and profound reason of such as by diligent study and long experience and observation are so learned in the law of this Realm, *as out of the reason of the same*, they can rule the case in question, in that sense, the rule is true; but if it be intended of the reason of the wisest man that professeth not the law of England (then I say) the rule is absurd and dangerous." (7 Rep. 19a.) Not even the King, the source of justice, could decide by his reason, as Lord Coke had told James the year before, for "His Majesty was not learned in the Laws of his Realm of England, and causes which concern the life, or inheritance, or goods, or fortune of his subject are not to be

decided by natural reason, but by the artificial reason and judgment of law, which act is an act which requires long study and experience, before that a man can attain to the cognizance of it." (12 Rep. 65.) And even the learned in the law, in Lord Coke's opinion, could not decide difficult cases without argument in open court, "where Almighty God openeth and enlargeth the understanding of the desirous of justice and right." (Rep. Pref. p. 37.)

These extracts show the ambiguity in the use of the term law of nature and that even the judges were uncertain whether they could find assistance in the law of nature or reason and what the meaning of reason was. Coke's theory is that in the absence of precedent, the standard of justice, as in art, when it has become developed, becomes that of the expert. This tends to fix an arbitrary standard and to prevent progress or flexibility. As Professor Gray truly says, "Thus to limit jurisprudence is to take from it its chief glory. The supposed immutability of its principles was what once gave it its dignity and charm; to-day it owes them rather to its possibilities and prospect of boundless development." ("Gen. Definitions in Jurisprudence," 6 Harv. Law Rev. 21, 28.)

There is another principle in Calvin's Case, namely, that the use of precedent had become established in Coke's day, although the number of precedents cited in that case should be taken as exceptional rather than as illustrating the normal practice. Judges in the time of Coke were accustomed to cite authorities by way of "ornamenting discourse" as well as by way of authority, and in Calvin's Case they seem to compete in displaying general as well as professional erudition. In Moore's report of the proceedings in Parliament, he cites Statutes, Year-Books, Fleta, Littleton, and Dyer. In Bacon's argument, besides these, he refers to Coke's Reports, Plowden, Bracton, Fitzherbert, Stamford,

Psalms, Genesis, Aristotle, and Xenophon. Lord Ellesmere, besides referring to the foregoing, cites the Register, Glanvil, Britton, Lambard, Blackwood, Hingham, the Civil Law, Ulpian, Tertullian, St. Augustine, Thomas Aquinas, St. Bernard, St. Gregory, Ezekiel, Esaias, St. John, St. Paul, Proverbs, Lucretius, Horace, Livy, and Cicero. Coke refers to authorities more than two hundred and fifty times, and besides most of the foregoing vouches the laws of Edward I and of William II, Rolls of Court and of Parliament, Book of Entries, Skeene, Bacon, Law of Nature, Broke's Abridgment, Doctor and Student, Virgil, Tully, Roman's and the Acts of the Apostles. An interesting picture is suggested where in his report he says, "and Coke, Chief Justice of the Court of Common Pleas, cited a ruled case out of Hingham's report, tempore E. 1, which in his argument he showed in court written in parchment in the ancient hand of that time" (7 Rep. 9b), "which afterwards the Lord Chancellor and the Chief Justice of the King's Bench, having copies of the said ancient report, affirmed in their arguments." (7 Rep. 10a.) Authenticity of report counted as part of its authority. And again where he says "and so it was in Perkin Warbeck's Case—and this appeareth in the book of Griffith, Attorney General, by an extract out of the book of Hobart, Attorney General to King Henry 7." (7 Rep. 6b.)

A sixth characteristic of the common law is seen in its judgments when contrasted with legislation proper.

The judgment in Calvin's Case in the Exchequer Chamber was that the plea of alienage was not sufficient in law to bar the plaintiff, and that defendant further answer. This judgment by indirection had all the effect of an act of Parliament, naturalizing all the *post-nati* of Scotland. If any other *post-natus* had brought a similar action, the Court of King's Bench would have followed Calvin's Case,

and so on indefinitely. The same result followed as would have been accomplished if Parliament had enacted the proposed bill naturalizing the *post-nati*.

It remains to contrast judgments in common law with legislation proper in the time of Lord Coke. Legislation then was not strictly confined to the King and Parliament. Other competitors were the King in Council, Resolutions of either House of Parliament, Electors of Parliament by vote, and the law courts themselves. (See Dicey, *Constitution*, pp. 48-58.) This in part explains the absence from the Statutes of the Realm of much of that general legislation which afterwards made acts of Parliament so voluminous. But speaking of Parliament by way of contrast with the courts, the former was composed of representatives interested in the subject-matter of legislation. The courts were operated by officers who were disinterested and impartial. Representatives in Parliament were chosen from the country at large. The "properties a Parliament man should have," as given by Coke, show the difference in theory between legislative function in his day and in modern times. He should be, Lord Coke says, without malice, rancor, heat, or envy; he should be constant, inflexible, and not to be bowed or turned from the right either for fear, reward, or favor, nor in judgment respect any person; and, third, of a ripe memory, that they remembering perils passed, might prevent dangers to come, as in the roll of Parliament appeareth. (4 Inst. 3.) The legislator then was a man of courage rather than general training. But the judges were selected from a body of professional men and were experts. No person or body had the right to override or set aside an Act of Parliament (Dicey, *Law of the Constitution*, p. 38), unless within the limitation suggested by Lord Coke (Dr. Bonham's Case, 8 Rep. 107a, 118a,—1609), which does not seem to have been

acted upon. However, there is apparent the same distrust by judges of popular legislation and reformation of the common law that is seen throughout the reports down to modern times. As Coke frequently said, it is a rule of policy and law that change of the law is to be avoided. (4 Rep. Pref. p. 9.) If Calvin's Case represented the theory of the time, the legislative function of the court practically was quite equivalent to that of Parliament. Commons had refused to enact a general law, but the judgment in the King's Bench, with the approbation of the King, seemingly accomplished the same result.

Turning now to the colonists, we find certain reasons why the common law should have continued its course unimpaired, and others that tended to modify it. Whatever may have been the theory in 1600 as to the law the colonists took with them to New England, probably the provisions in the Charter of Virginia of 1606 were inserted as a result of a discussion as to the naturalization of foreign-born subjects, by Lord Coke, who was then Attorney-General, and it is thought drafted the charter. The provision therein whereby James conferred "all liberties, franchises, and immunities within any of our other dominions" upon the colonists, at a later time was claimed to confer the rights of common law on the colonists and their children. The popular antipathy to the common law in most of the colonists in their early history cannot have been a sudden matter, but probably expressed the popular sentiment expressed in debates in Commons and in the statutes in the reigns of Elizabeth and James. For years in the colonies, there was almost uniform prejudice against lawyers. There was a tendency to revert to popular forms in administering justice. The standard was "God's Law," or the "Law of Nature." The jury system for a time was rejected in Connecticut and adopted in a modified form in other colonies.



The literature of the civil law was well represented in colonial libraries. As Dr. Reinsch says in his thesis on the English Common Law in the Colonies (*Bulletin Univ. of Wis.* no. 31, *Mad. Wis.* 1899): "The process which we may call the reception of the English Common Law by the colonies was not so simple as the legal theory would lead us to assume. While their general legal conceptions were conditioned by and their terminology derived from the common law, the early colonists were far from applying it as a technical system; they often ignored it, or denied its subsidiary force; and they consciously departed from many of its most essential principles. This was but natural; the common law was a technical system adapted to a settled community; it took the colonies some time to reach the stage of social organization which the common law expressed; then gradually more and more of its technical rules were received." (p. 58.)

After being dormant for nearly one hundred and fifty years, the vital power of common law displayed itself from 1750 onward. At first mainly on its public side, as a basis for argument in the appeals for civil liberty; later, in its general aspect, in the local courts under the influence of lawyers trained in the Inns of Court. It would be hard to overestimate the influence in the colonies of lawyers trained in these Inns. Winthrop, Bellingham, Dudley, and Ward all had studied law in the Inns, and the recent catalogue of notable Middle Templars shows upon its list the following who signed the Declaration of Independence: Charles Carroll of Carrollton, Middleton, Rutledge, McKean, and John Dickenson and Arthur Lee. The continual discussion and publications of such men as these, not only trained them, but prepared the public for the federal laws and constitution and the state constitutions.

At the end of three hundred years, the resemblances be-

tween the common law in America and its parent in England are greater than the differences, and the differences are rather in degree than in kind. Each has borrowed from the other's statute law; the American more from the English unwritten law. The common law in America has the same adaptability and generality, but publicity is greater, here both in civil and in criminal cases. In the former there is an excess of publicity, both in the progress of trials and through the newspapers. In jury trials the American courts are more dilatory and more spectacular than the English courts. In some of the Western states a criminal trial gives attorneys an opportunity to advertise that is "worked for all that it is worth." There is much less freedom of comment on evidence and law by the judges in America than in England, and the relation between the judges and the jury is less close. In two respects there has been a departure from the English theory. These are the theory of constitutional law, especially as to the power of the court to pass on the constitutionality of statutes, and in the source of grounds for decision by the judges. In the latter case in some of the states there seems to have been developed a substantially different theory from that shown in the discussion of Calvin's Case.

As I have tried to show, the factors that have contributed to make the characteristics of the common law were popular and professional; the same factors are seen in America. At the close of the Revolution there arose need of a system of law in each of the states. There was uniform agreement that the shortest cut to providing one was to adopt the common law of England. This was done in all the states, with the limitations that it was not to apply when inconsistent with local limitations or conditions. This exception gave the judges a discretion in applying common law that has tended to establish a practice of departing

from a rigid rule or precedent, and instead to apply a standard suggested by the needs of the people or local conditions. A second influence came from the different social position of lawyers in America. In England the bar was allied with the Crown. In America the sovereign power after the Revolution resided in the people. This made the English lawyers more conservative. In America, while they were an aristocracy, they were in touch with the people and responsive to popular ideas. A third factor is that the judges in many states are elected by the people and inevitably are affected by the interests of their electors more than by an abstract system of law. A fourth influence is the general indifference of Americans as to authority from the past. And a fifth is the American characteristic to ask for results that are practical and tangible rather than those that support a theory.

There is a considerable but not yet classified body of decisions that illustrate this tendency of the courts to adapt the law to popular need and local conditions. One case only will be chosen to illustrate this. It is the case of *Katz v. Walkinshaw* (141 Calif. 116). Before speaking of this case, it is necessary to refer to the case of *Lux v. Hagen* (69 Calif. 255). The question in the latter case was whether an upper appropriator of water, which he applied to general and public use, had a better right to the water of the stream than a lower and earlier riparian proprietor. It was contended that the public welfare demanded that the later right should prevail over the earlier. There was a California statute adopting the common law. The local arid conditions, the necessity for irrigation, were urged as reasons for modifying the rule of the common law restricting the taking of water from a stream to a reasonable use measured by the needs of other riparian proprietors. But to this proposition Judge McKinstry replied, "While

the argument *ab inconvenienti* should have its proper weight in ascertaining what the law is, there is no 'public policy' which can empower the courts to disregard law; or because of an asserted benefit to many persons (in itself doubtful) to overthrow settled law. This court has no power to legislate, especially not to legislate in such manner as to deprive citizens of their vested rights." (69 Calif. 299.) "We know of no decision which intimates that a difference in climatic or geographical conditions may operate to transfer a right of property from those in whom a right of property is vested by the common law." (69 Calif. 306.) The later case of *Katz v. Walkinshaw* raised a question as to rights in percolating water and seems to have been decided upon a different principle, and one which illustrates the proposition I have stated. The question was whether an owner of land could pump percolating water from his land and sell it for a general use on remote land, if thereby he deprived the adjoining landowner of percolating water in his land needed for use on his land. By the common law, each party had an equal right to percolating water without restrictions from the corresponding right of the other. But the court held that local conditions required a departure from the common law, and on the principle of utility—of a fair use of the water, so as to secure the greatest benefit to the greatest number—decided that the defendant could not sell the water, if thereby he exercised an unreasonable use measured by the needs of the adjoining plaintiff. It would seem that the rule of property that probably existed in California as to percolating water was departed from in this case, and in its place one laid down based upon public utility.

In this case, the court adopts the view that the law is a practical science to be applied so as to conserve the interests of the people to whom existence is the main problem

of life, and not that it is a philosophical theory to be applied according to the wishes of the expert and to conserve an ideal and immutable professional standard.

This theory of utility was advanced by the late Austin Abbott in a paper read before the section of legal education of the American Bar Association in 1893, in which he spoke as follows: "Existing American jurisprudence looks to the actual situation of affairs. All the phases of jurisprudence treated in books are tributary to the wisdom and caution necessary in working out the development—not slowly going on, whether we recognize it or not—[of] the jurisprudence of utility, a jurisprudence which recognizes the unspeakable value of all the traditions of the past, and respecting the limit of statutory command, seeks also for the premises to be found in the welfare of the community, and reasons from them, too, in ascertaining what premises are suitable to be received, as governing the administration of law among our people. It would be easy to show that this change in the conception of law is necessitated by our condition, and that its future advance is inevitable." (Vol. 16, Rep. Am. Bar Ass'n, p. 374.)

It remains to contrast the legislative and judicial functions in America at the present time.<sup>1</sup>

The legislative functions are discharged by representatives. They make general laws for future public needs. To insure this, the representation is broad; all classes are concerned and should have a voice. There is no test of fitness excepting age and citizenship; and broad representation is not inconsistent with a low grade of intelligence. The representatives are directly interested in the subject-matter of legislation. They legislate for themselves and their constituents. In a sense it is optional whether the

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<sup>1</sup> On the distinction between the legislative and judicial functions, see the admirable paper by Reuben C. Benton, 8 Am. Bar Ass'n Rep. 261 (1885).

laws they enact shall be obeyed or go into desuetude. The judicial functions are discharged by representatives. They prescribe a rule governing a past concrete transaction between definite individuals. There is a fitness required for the discharge of this function determined by education and public test at the bar. The representation is narrow with a high grade of intelligence. The judges are disinterested—they are umpires with a power behind them to enforce their judgment. The fundamental difference between legislative and judicial functions is that the former is an effort to answer an indefinite number of hypothetical questions to arise in the future—the latter, a definite answer to an existing question raised in the past.

But the tendency of modern American courts is so to formulate their judgments as to provide an answer to hypothetical questions between future litigants. In this sense there is a tendency on the part of the court not merely to legislate specially but broadly.

There is a theory that legislation is a conscious expression of the jural needs of the people. Statutory laws are said to be “analogous to the voluntary resolutions of a person for self-improvement.”<sup>1</sup>

Another says, “A people’s thought, habit, will, and purpose infuse themselves into and make the law.”<sup>2</sup>

This view is consistent with compact and homogeneous communities where the connection between the public and the law-maker or judge is close, but it is submitted that in America, excepting on great public questions on which public opinion is strong, legislation does not reflect public opinion and frequently is special legislation in disguise. This is an unfortunate result of the indifference of the public, of our system of legislation, and of “the truth often

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<sup>1</sup> Address of Mr. Carter, President of the Am. Bar Ass’n, 1885, p. 224.

<sup>2</sup> Address of Mr. Tucker, President of the Am. Bar Ass’n, 1893, p. 206.

illustrated that a small body of men deeply interested and able easily to coöperate is more powerful than a vast body of men less deeply interested and unfavorably circumstanced for coöperation."<sup>1</sup>

It is submitted that the same truth holds good where a body of professional experts dealing with a special kind of learning intervenes between the public and the expression of public needs in the courts, and that thereby the public voice is not effective in declaring its jural needs. It is believed that the characteristics of law are affected by the source of the law. This source is either popular or professional. The former contributes simplicity, adaptability, and progress—the latter technicality, rigidity, and conservatism. In America law has become a practical science, and the problem of adjusting the ideals of the expert to the comprehension and needs of the common person is being worked out with the aid of the disposition of the American to favor common sense rather than abstract theory.

It remains to inquire whether there has been developed in America an entirely different system of law, to ask whether there is a system of federal common law. It is not within the scope of this paper to try to answer this question, even if there were data enough on which to base an answer. If the courts should deem it necessary to affirm that such a body of law exists—and on the old theories there seems no difficulty in imagining this,—the gradual disclosure of it through successive decisions will be one of the most interesting phases of the growth of law.

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<sup>1</sup> *Autobiography of Herbert Spencer*, vol. I, p. 433.





# THE RELATIONS OF ROMAN LAW TO THE OTHER HISTORICAL SCIENCES

BY WILLIAM HEPBURN BUCKLER

[WILLIAM HEPBURN BUCKLER, member of the Bar, Baltimore, Maryland. b. Paris, France, 1867. University of Cambridge, 1887-91; B.A. *ibid.* 1890; LL.B. *ibid.* 1891; University of Maryland, Law Department, 1893-94. Member of the Baltimore Bar 1894—. AUTHOR OF *History of Contract in Roman Law*. Cambridge, 1893.]

OUR language has been compared to a vast museum filled with historical monuments which are its words: among these there are few more significant than the word Jurisprudence. To the Romans this meant a knowledge of their own particular law, while for us it has come to denote the science of general legal principles. Thus it confronts us as a record of the past, reminding us that though our laws as they stand may not be of Rome, yet surely their foundations are upon her holy hills.

The much abused quotation about Peace and her victories is eminently applicable to that quiet but steady extension of the legal influence of Rome which is evidenced by the history, not only of law but of other forms of human activity. Indeed, I think it can be shown that none of the historical sciences, whether of Law, or of Politics, or of Economics, or of Religion, or of Literature, or of Language, or even of Art, lies wholly out of reach of that mighty influence. In whichever of these branches of learning a man may engage, he can fairly say, "*Iuris civilis nihil a me alienum puto.*"

To develop this proposition here with anything approaching to completeness would be an impossible task. I can only attempt to indicate its outlines, and to bring out some

points of contact between Roman law and the other sciences commonly called historical.

## I

The first to be considered is the history of Law, since here the connection is, as might be expected, more intimate than anywhere else. A discussion of the influence of Roman law upon other legal systems must deal with two classes of Western states: first, those in which this law has survived down to our own time as the result either of inheritance or of what the Germans call "reception"; secondly, those like England or the American Commonwealth in which pure Roman law has been rejected.

There are indeed vast regions in which other venerable bodies of law, such as the Chinese and the Muslim, have long held sway, but these we may here disregard, since their history has kept aloof from that of Western law. We may sometimes have felt with Gibbon "the hasty wish of exchanging our elaborate jurisprudence for the simple and summary decree of a Turkish cadhi," but further than this we have never gone. And the Eastern nations, with the single recent exception of Japan, have on their part done nothing to put themselves in touch with our Western legal systems. The only direct effect they ever had upon these was to destroy the Eastern Empire, and with it the Roman law which had flourished at Constantinople for more than a thousand years. We may therefore confine our inquiry to the two groups of Western states already mentioned.

Sweeping generalizations are in history even more odious than comparisons, but I think there is one that can safely be made as to the group of states which, like France and Germany, have either inherited or "received" the Roman law. It is that in those states, wherever that law was not an actual relic of Roman rule, its supremacy has finally

been recognized, not through conquest or compulsion, but owing to the attraction of its intrinsic excellence. The reception of Roman law in Germany in 1495 has been regarded as a case of official compulsion. Recent research, however, has shown that the *vocabularius iuris utriusque*, the *collectio terminum legalium*, and other popular encyclopedias of Roman law had a great manuscript circulation in Germany for more than a century before the reception, and that one of them went through fifty-two printed editions in the fifty years between 1473 and 1523.<sup>1</sup> Hence it appears that when Berthold of Mainz proposed the establishment of the *Reichskammergericht*, with its civilian doctors as judges, his action was only the outcome of a movement which had long been in silent preparation.

The peaceful reconquest of the European continent by Roman law began with that revival of its study in the Italian universities at the end of the eleventh century, which was one of the greatest eruptions of intellectual energy that the world has ever seen. It may perhaps best be compared to that enthusiasm for the natural sciences which began at the end of the eighteenth century, which Taine has described as one of the factors in the French Revolution, and in the midst of which we still live. As biology and physics now flourish because they are popular, not because they are compulsory, so did the study of Roman law in the Middle Ages. And just as there are now some who deplore that scientific men should derive wealth from their science, instead of being content to pursue it from pure love, so the twelfth century complained that many cultivated the law, not for its beauty, but for its profits. There was, however, much genuine intellectual fervor which spread from Italy even to Paris and Oxford. That is a pretty story and one very characteristic of the period which Professor

<sup>1</sup> Seckel, *Gesch. beider Rechte im Mittelalter*, p. 59.

Holland has preserved, of the two Frisian brothers, Emo and Addo, taking turns at Oxford to sit up all night copying the law-book of Vacarius.<sup>1</sup> Peter of Blois, a Frenchman who studied in Bologna under the great Irnerius and who became Archdeacon of Bath, informs us that he used to read the *Code* and *Digest* for sheer enjoyment. He has even described to us his own enthusiasm for legal studies, which was doubtless typical. "That ancient law," he says, "with its magnificent furniture of words, had powerfully enticed me and had intoxicated my mind."<sup>2</sup>

There was, indeed, some opposition to this legal furore, partly because it distracted the minds of the clergy from their spiritual duties, partly because it was thought to add to the law's delay, and partly because it conflicted with ancient customs of the land. Thus it has been shown that the famous prohibition of the teaching of civil law at the University of Paris, by Pope Honorius III in 1219, was issued at the request of the French king, who did not wish his dominions, which like England had their indigenous common law, to be invaded by a new and foreign legal system.<sup>3</sup> The Constitutions of Clarendon in 1164 had represented a similar English protest couched in a different form.

But despite occasional checks the Roman law has, except in the case of Hungary, swept steadily and victoriously over the whole continent of Europe. This result has been largely due to the influence in early times of the clergy, the backbone of the educated class, who had in their canon law a borrowed and dilute civil law, and who also studied the pure civil law with much diligence. In 1245 the great lawyer Fieschi, better known as Pope Innocent IV, made provision for the teaching of Roman law at the Papal

<sup>1</sup> *English Hist. Review*, vol. vi, p. 247.

<sup>2</sup> Petrus Blesensis, Epist. 26, in Migne's *Patrologia*, vol. 207.

<sup>3</sup> Beaune, *Fragments de Droit et d'Histoire*, p. 97.

capital, and his name deserves to be particularly honored by students of jurisprudence, since he is said on high authority to have been the first jurist who distinctly conceived the *universitas*, our corporation, as a fictitious person.<sup>1</sup>

The history of the spread of Roman law throughout the European continent and in other parts of the world need not and cannot be told here in detail: to do so would require a volume for each country. We all know the result to be that at the present date, notwithstanding the rapid growth of our own commonwealth, more people are living under the legal system derived from Rome than under that derived from Westminster Hall.<sup>2</sup> Germany parted company with the Roman group in 1900, but her new imperial code shows the influence of Roman conceptions, and just as the New York codes have not altogether banished Blackstone from New York, so it can scarcely be expected that a nation trained in the *Pandekten* will soon forget their principles. An eminent French scholar has shown that to understand fully the French dotal system we must go back to the *SC. Velleianum*.<sup>3</sup> And it is well known that the *Code Napoléon*, which in its turn has had a contagious influence somewhat similar to that of Justinian, is fundamentally Roman. It is interesting to note in passing that this Exposition commemorates among other things the important fact that, by the cession of the Louisiana territory, a vast area was withdrawn from the sway of that modern Roman code, though in the state of Louisiana where the *Code Napoléon* had taken firm root, it still continues to flourish.

There can thus be no doubt that the history of Roman is vitally connected with that of Continental law. Indeed,

<sup>1</sup> Maitland's preface to Gierke's *Political Theories of the Middle Ages*, p. xix.

<sup>2</sup> Bryce, *Studies in History and Jurisprudence*, p. 74.

<sup>3</sup> Glde, *Etude sur la Condition de la Femme*, p. 429.

if we adopt the view of historic continuity which Freeman inculcated, we may say that the history of law on the Continent is simply the history of Roman law brought down to the present date. It need hardly be said that I have not taken into account that form of speculation on abstract legal principles best known by its German name *Naturrecht*, which cannot be said to have any historical connection with the *ius Naturale* of the *Digest*, and which is quite un-Roman both in its matter and in its methods.<sup>1</sup>

When we turn to consider how Roman law is related to that other great legal system which was built up in England, and transplanted to this country and to her other colonies, we find the sailing by no means plain. In theory, of course, Roman law is an absolute alien to us, and our own law has an unblemished Teutonic pedigree. But we may at once suspect some flaw in this theory when we find it stated that in England at the beginning of the last century, in the Spiritual Courts, the Military and Admiralty Courts, and the courts of both universities, "the civil law and its form of legal proceedings greatly prevail."<sup>2</sup> Since these may be looked upon as so many reservoirs of Roman law, the question is, did they ever leak? Did the civil law, and if so, how far, ever percolate through the pen of text-writers or the mouth of judges into the bed-rock of common law or equity doctrine?

Sir H. Maine thought this had taken place on a very large scale at an early stage in English law through Bracton's borrowing from the Italian civilian Azo, and he accused the English judge of having made up a third of his treatise out of Roman law and having palmed it all off as English. But this charge will scarcely hold, since Professor Maitland has shown that Azo has supplied only one-

<sup>1</sup> See Lorimer's *Institutes of Law*, 1880.

<sup>2</sup> Butler, *Horae Juridicae Subsecivae*, p. 77.

fifteenth and the *Corpus Iuris* only one-fortieth of Bracton's material.<sup>1</sup> The fact is that unmistakable instances of the importation of a Roman rule into an English text or an English decision are very hard to find. Sir Frederick Pollock has found only one, and Professor Maitland has mentioned another;<sup>2</sup> and where such explorers have been over the ground, the treasure still unfound must indeed be insignificant. But there may be smuggling as well as regular importation of legal ideas. And this sort of smuggling may, as in the case of literary plagiarism, be partly unconscious and therefore all the harder to trace. A good instance of the difficulty of ascertaining whence any given rule in English law was derived is the conflict of high authorities respecting the origin of the exceptional liability of common carriers. On this point Sir William Brett and Mr. Justice Story are opposed to Lord Cockburn and Mr. Justice Holmes; the two former holding that the rule of liability was adopted from the Roman law, while the two latter think that it was not.<sup>3</sup>

The relation between Roman and English law is probably closer than we think or than we shall ever be able to prove, because it was, so to speak, illicit. This is explained in the *De Laudibus Legum Angliæ* of Chancellor Fortescue. When the Prince asks why his ancestors had failed to introduce the civil law into England, Fortescue replies that the English regarded it as an instrument of tyranny. The same feeling was displayed more than a century after Fortescue in the violent attack made by Parliament on Cowell's *Interpreter*, a book which undertook to point out the resemblance between Roman and English law. Clearly, therefore, if an Englishman borrowed from the civil law,

<sup>1</sup> Maitland, *Bracton and Azo* (Selden Soc.) introd.

<sup>2</sup> Pollock, *Nature of Jurisprudence*, p. 326. Maitland, note to *Canon Law in the Church of England*.

<sup>3</sup> Sir W. Brett in *Nugent v. Smith*, L. R. 1 C. P. D., pp. 28-30; Lord Cockburn in same volume, pp. 428-30; O. W. Holmes, Jr., *Common Law*, p. 181.

he was not likely to admit the debt. "For obvious reasons," as Mr. Bryce has said, "the Chancellors and Masters of the Rolls did not talk about Nature,—they referred rather to the law of God and to Reason. But the ideas were Roman, drawn either from the Canon Law, or directly from the *Digest* and the *Institutes*."<sup>1</sup> If we wish an indirect proof of this statement—for direct proof is not yet forthcoming,—we have only to read a few pages of Story's *Equity Jurisprudence*, or of his treatises on Partnership or on Bailments, in all of which he quotes from the *Institutes* and *Digest*, often in the text, still oftener in the notes. We can scarcely avoid the conviction that the parallels which he constantly draws between Roman and English rules are more than accidental. This problem has not yet been fully worked out, and probably cannot be, till the early records of the English Ecclesiastical Courts are published and studied. But the results hitherto attained show that the borrowing of Roman principles was carried out in England, not by wholesale, but in small and haphazard installments. In early English law it is admitted that *possessio* influenced the conception of seizin, and *laesa maiestas* that of treason.<sup>2</sup> At a later day the Court of Chancery was similarly influenced in dealing with mortgages and with uses and trusts, while in the construction of documents and wills it naturally followed the Ecclesiastical Courts, and borrowed its rules from the fiftieth book of the *Digest*.<sup>3</sup> Blackstone rightly ascribed to Roman sources the practice of hotchpot and the rules for the distribution of personality.

It is interesting to note how this affected the great lawyers of the seventeenth century. Sir Edward Coke was as far as possible from being an enthusiastic civilian, yet even in his work may be found traces of Roman influence,

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<sup>1</sup> Bryce, *Studies in History and Jurisprudence*, p. 599.

<sup>2</sup> Pollock & Maitland, *History of English Law*, vol. II, pp. 46 and 503.

<sup>3</sup> Scrutton, *Roman Law and the Law of England*, p. 157.



though possibly he was not aware of it. For instance, he gives the rule, "*Nullus commodum capere potest de iniuria sua propria*," which is merely a slightly altered form of the *Digest's* "*Nemo ex suo delicto meliorem suam condicionem jacere potest*."<sup>1</sup> In another place he quotes from Bracton the rule on testamentary ambiguity, "*Benigne interpretari et secundum id quod credibile est cogitatum*." Here, though his language is different, his use of Marcellus's phrase "*benigna interpretatio*" seems to confirm the Roman origin of the rule.<sup>2</sup> The same may be said of the somewhat longer statement given by Coke of the rule "*ratihabitio mandato comparatur*."<sup>3</sup> Turning to Coke's great adversary, we find in his work also distinct traces of the civil law, though it has been said that Bacon had only a "bowing acquaintance" with it. In his lectures on uses, for instance, he draws a comparison between the use and the *fidci commissio*, and in his short essays on legal maxims he supports at least two rules by citations from Roman sources.<sup>4</sup> To one rule which he has stated he adds: "These be the very words of the civil law." More extracts of this same kind could be collected from other English law-writers of the seventeenth century; and after making due allowance for the hostile attitude of the Inns of Court, I think such extracts are just what we might expect to find. For there can be little doubt that the classic sources of Roman law were in that century more or less familiar, not only to those who had prepared for practice in the Court of Arches and Doctor's Commons, but to all well-educated men. Professor Maitland has shown in his delightful Rede Lecture that England under Henry VIII was in some danger of

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<sup>1</sup> Coke, *Inst.* 148b.

<sup>2</sup> Coke, *Inst.* 36a. *Dig.* 34, 5, 24.

<sup>3</sup> Coke, *Inst.* 207a; *Dig.* 46, 3, 12, 4.

<sup>4</sup> Bacon, *Maxims*, Reg. 3 and 11.

having a "reception" of her own;<sup>1</sup> a permanent result of which was that at her universities, where no English law was taught until 1758 at Oxford and 1800 at Cambridge, there have been Regius Professors of Civil Law since Henry VIII's time. Some of them, like Alberico Gentile, Sir Thomas Smith, and John Cowell of *Interpreter* fame, were of far more than mere academic reputation. It must be remembered, too, that the books of Justinian, though to us they seem foreign, are in a language which to the English of the seventeenth century was still the literary vernacular of all the learned professions. The Roman law had then begun to supply what Sir H. Maine has called the *lingua franca* of universal jurisprudence. That it should not have had some influence even on English judges and legal writers is almost inconceivable.

We may here consider the origin of that best known modern product of Roman law which is usually associated with the name of Hugo Grotius. International law, at least in its classic literary beginnings, is admitted to be of Roman mould, and a very slight acquaintance with Grotius's famous book will suffice to convince any one of that fact. Two points are of special interest in this connection; first, that the work of the Italian civilian Alberico Gentile, Regius Professor of Civil Law at Oxford, has lately been shown to be the model on which Grotius improved;<sup>2</sup> and secondly, that the great John Selden answered Grotius's earlier book *Marc Liberum* in learned reply which shows what excellent knowledge of Roman law an English lawyer could possess. Selden prided himself on being a common lawyer, and certainly had no mean grasp of the common law and its history, as any one will discover who looks at his notes on Fortescue and his book on Fleta. Yet he

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<sup>1</sup> Maitland, *Canon Law in the Church of England*.

<sup>2</sup> Walker, *History of International Law*, p. 335.

answered Grotius in a style on which few civilians could have improved. His very description of his opponent as "*rerum humanarum atque divinarum scientissimum*" is an echo of the well-known Roman definition. While he cites Bracton and Fleta, and resorts to English archæology by introducing the ship on the rose-noble of Edward III as a proof of English supremacy over the sea, yet most of his authorities are from the *Code* and *Digest*, and his learning extends even to the Theodosian Code. He speaks of princes becoming *sui iuris* by prescription; and in his notes on Fortescue he contrasts the "issue" of English with the *litis contestatio* of Roman procedure. Selden's case would alone suffice to show that the civil law was in his time no *terra incognita* to learned English lawyers, though it may well be admitted that few were so learned as he.

Of early international law as such there is not much to be noted beyond the fact already mentioned that it was founded and built on Roman law. If, for instance, we wish to know where Grotius got his idea of *postliminium*, we turn to the *Digest*, and similarly with his conception of *ius gentium* and *ius naturæ*. Neither of these was to him an abstract system founded on pure moral reasoning,—witness his inclusion of rules on lying and deceit among the rules of the law of nature,—but he thought with Gaius that *ius gentium* was that law "which is observed among all mankind equally on principles of natural reason"; and he based his law of nature not on abstract ideas but on the necessities of social intercourse.

For our present purpose the most interesting point to notice in the classical writings on international law is the way in which the texts of the Roman jurists are there treated as repositories of *ius gentium* and of *ius naturæ*. Roman law seems in fact to have been regarded, even by

\* Selden, *Marc Claussium* (1636), p. 196.

men like Selden, as a sort of universal common law, the principles of which should prevail wherever they were not superseded by some local system. As there is obviously no such system applicable to international relations, the supremacy of Roman law in that sphere was everywhere admitted. Such a view had two important results. The connection of international law with a compact and well-understood mass of written law has caused it to be treated, except by strict analysts like Austin, as something very different from international morality. And on the other hand the recourse to the Roman jurists for the settlement of international questions still further increased the tendency to regard Roman law as embodying principles of universal validity.

While the classical jurists are even now by no means obsolete, as was shown in the Behring Sea arbitration, yet most of the unsettled questions of the present day, such as the definition of contraband or the control of wireless telegraphy, will not be determined by reference to Roman texts, but by the common assent of nations. The service rendered by the Roman jurists to early international law lay precisely in the fact that they were regarded as voicing this common assent, and that their writings commanded obedience, although nobody perhaps could clearly have explained why.

We have thus seen that while Roman law has influenced the law of England, and has virtually originated that of Continental Europe, its chief triumph has been the creation of a system of world-wide law, such as would have delighted the heart of the philosophic Ulpian.

As an outcome of the successful career which has been thus briefly sketched, Roman law became the parent, not only of the word jurisprudence, but of the science which that word denotes. For centuries all over Europe gram-

mar was studied, and in England is still studied, in the concrete form of Latin grammar. In exactly the same way, the science of legal principles was studied through the medium of Roman law. The legists and canonists of the Middle Ages and the Renaissance knew of no other medium, and even in the English universities this law was all-powerful. When Austin founded the modern science of jurisprudence nearly one hundred years ago, although he worked in a non-Roman atmosphere and belonged to the school of Bentham and James Mill, who respected the *Digest* as little as they did Blackstone or the French doctrine of natural rights, it is interesting to note how little he succeeded in escaping from the clutches of the Roman law. Not only did he use the *Corpus* very largely as material for his analytical dissecting-knife, but when he gave the results of his analyses, he merely did on a broader scale and with greater elaboration just what a Roman jurist used to do when he constructed a definition of *furtum* or *possessio*. The study of Roman law was just then beginning to enjoy on the Continent, in common with other branches of historical science, the greatest of all its revivals. In the powerful hands of Savigny and his followers, its principles were being dragged out from that "disorderly mass" which offended James Mill,<sup>1</sup> and were making splendid additions to the material of juristic science. Soon afterwards the historical movement started by Savigny was extended to remoter regions, and helped to found the modern study of comparative jurisprudence. This was signalized in a striking way when in 1831 the Collège de France established simultaneously the chair of Archæology for Champollion and that of Compared Legislation which was soon filled by Laboulaye. In England Sir Henry Maine and his school did as much for the promotion of comparative jurispru-

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<sup>1</sup> Mill, *Jurisprudence* (1822), p. 5.

dence as they did for the revival of Roman law. Since then the comparative method has developed the still more modern science of ethnological jurisprudence, which places the customs of the negro, the Chinaman, and the Bushman on a level with the laws of the Roman, regarding them all, not as coincidences, but as emanations of a common human nature.<sup>1</sup> Though these newer and broader methods of investigation might seem destined to supersede the study of Roman law to which they owed their birth, such a thing is never likely to occur, simply because the backward races present to us only primitive conceptions in a few subjects such as property, slavery, or marriage, whereas, the Roman law was adapted to a high and complex civilization similar to our own. It must for many years, if not always, remain true that Jurisprudence cannot repudiate its relationship or sever its filial connections with Roman Law, except at the cost of great injury to both.

## II

The connection between Law and Politics is so close that some writers like Montesquieu and Bentham have been equally interested in both sciences. Therefore Roman law in its influence on legal development could not fail to be also a factor in politics, both actual and theoretical. Political conditions may be said to be a resultant of social forces and of abstract ideals, acting and reacting upon one another; and thus political theory is always a factor in actual politics. But the actual and the theoretical should be kept distinct and be separately treated. After the downfall of the Western Empire, and with it of the rule of pure Roman law in many parts of Europe, the history of actual European politics can only be understood by studying various concurrent influences, such as Christianity, Teutonic custom, in-

<sup>1</sup> A. Post, *Grundriss der ethnologischen Jurisprudenz*.

cipient feudalism, etc. Among such ingredients the Roman law must always be counted, but as to how far it may have affected each individual country no general statement can be made.

In two great constitutions, however, those of the Medieval Empire and of the Medieval Church, the legal example of Rome was paramount. For five hundred years she had established both in principle and in practice that her *princeps* should be the supreme potentate of Europe, so that when Charles and Otto were crowned Emperors at Rome it was naturally held that the principate was continued in them. But unfortunately the successors of St. Peter also aspired to fill that same office, on the ground that the supreme head of the Church must be the rightful occupant of the imperial throne. Thus Gregory VII claimed the rights of Cæsar as well as those of Pontifex Maximus, and insisted that Henry IV was subject to his jurisdiction. Indeed, the tremendous struggle between Pope and Emperor, which for centuries was the storm-centre of European politics, was simply a long dispute as to which of these rulers was that mighty *princeps* described in the *Digest*, who was *legibus solutus* and whose will had the force of law. The head of the Church got the better of the controversy so far as real power was concerned, for it is well known that the imperial authority, though immense in theory, was, except in a few instances, very shadowy in fact. Again in the organization of the Church Roman law had a great effect, for—as Professor Harnack has pointed out—we have in the great system which centres at the Vatican a fair copy, surviving down to the present day, of administrative organization of Constantine and Justinian.<sup>1</sup> Apart from its lessons to the Church and Empire, the civil law supplied to the rest of Europe that famous maxim *quod principi placuit*, etc.,

<sup>1</sup> Harnack, *History of Dogma* (trans.) vol. I, p. 122.

which was so unpopular in England. This, in combination with Church doctrines, did much to fortify, if not to produce, the system of absolute monarchy which generally prevailed on the Continent till the French Revolution, and which is even now not entirely dead.

When we come to consider political theory as expressed in literature prior to the Reformation, it is certain that all writers on the subject owed much to Roman law. Aristotle, the Bible, the Fathers, and the texts of Roman jurists are the armories from which most of their controversial weapons are drawn. The work done by the medieval legists and canonists in developing political theory has not been sufficiently studied.<sup>1</sup> But they were still for the most part too thoroughly possessed with the idea of a single world-empire to be capable of speculating independently as to the origin and nature of sovereignty or of the state. The best known political writings of that period were merely briefs for or against the Pope or his rival. Thus St. Thomas Aquinas argued that, since government was devised to promote the highest good of man, and this consisted in the fruition of God, the head of God's Church on earth should be the supreme ruler. In his *De Monarchia* on the other hand, Dante maintained the view that the Empire of his day was the legitimate successor of the Roman Empire, and attacked the Pope's pretensions to supremacy. He made a legal argument to show that the alleged Donation of Constantine, if genuine, was invalid, and that Leo could not have had the right to bestow the imperial office on Charles the Great. Dante was convinced that the world had never been so well governed as when it obeyed a single ruler.<sup>2</sup>

During the Renaissance, Bodin and Machiavelli, the

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<sup>1</sup> Maitland, Gierke's *Political Theories*, &c., p. 101.

<sup>2</sup> *Convito*, IV, 5.



founders of the modern science of politics, were able to inquire, with far less partisan bias, into the foundations and functions of the state. But as they worked in the legal atmosphere of the time, which was one of Roman law, they naturally arrived at theories of absolute monarchy, similar to that which we see depicted in the *Corpus Iuris*, though they would both have agreed with Julianus that the ultimate basis of law lies in the popular will.<sup>1</sup> Though Bodin insisted that Roman law was dead and possessed no general authority, his conception of the family was purely Roman, and he was unable to conceive of a king as subject to constitutional control.<sup>2</sup> Machiavelli was particularly enamoured of Roman examples in politics. He admired the Roman Republic far more than the Empire, yet for practical purposes he advocated the absolute power of a prince. His works had much influence on English political writers in the age of Elizabeth and strengthened their arguments in favor of absolutism.<sup>3</sup> The *Digest* was still recognized as a repository of valuable citations, for John Knox made use of it in attacking the "regiment of women," and the civilian Gentile resorted to it when writing in support of James I's royal prerogative. But after the early seventeenth century its direct authority in political discussion seems to have declined.

The conception of natural law which figures in the works of political theorists both before and after the Renaissance, can trace its history directly back to the texts of Roman law; but, as Mr. Bryce has shown in one of his *Studies*,<sup>4</sup> the precise scope and force of natural law were so differently viewed by different writers that it would be impossible

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<sup>1</sup> *Dig.* 1, 3, 32, 1.

<sup>2</sup> Fournol, *Bodin prédécesseur de Montesquieu*, p. 55.

<sup>3</sup> Dyer, *Machiavelli and the Modern State*, pp. 58, 77; Einstein, *Italian Renaissance in England*.

<sup>4</sup> Bryce, *Studies*, &c., pp. 593, 597.

here to summarize their opinions. It is now well known that the theory of the law of nature, borrowed from the Roman jurists by St. Isidore of Seville, passed from him into Gratian's *Decretum*,<sup>1</sup> and that by thus becoming embodied in the canon law it was familiar to European thought even before the study of the Roman texts was revived:

The most famous theory of modern politics, that of the Original or Social Compact, did not become conspicuous till the end of the sixteenth century and the beginning of the seventeenth, although in a medieval form it had appeared as far back as the eleventh century.<sup>2</sup> Its introduction into modern thought is due to the German Johannes Althusius, the Englishman Richard Hooker, and the Dutchman Hugo Grotius. Their position, as stated by Hooker in the *Ecclesiastical Polity*, was that there are two foundations of public societies; first, natural inclination; secondly, "the order expressly or secretly agreed upon touching the manner of their union in living together." This view of the origin of the state was adopted in various forms by Hobbes, Locke, and Blackstone, but its most famous exponent is Rousseau, who carried it to extremes undreamt of by its first authors. Its significance for our present purpose is that it clearly seems to have been suggested by those passages from the Roman jurists which declare law to be *communis rei publicae sponsio*, and which describe custom having the force of law as *tacita civium conventio*.<sup>3</sup> For if law could be regarded as the product of an agreement between the citizens of a state, it needed but a short step to find in a similar agreement the origin of the state itself.

There can thus be no doubt that, at least down to the

<sup>1</sup> *Ibid.* p. 594. Carlyle, *History of Medieval Political Theory*, p. 106.

<sup>2</sup> Carlyle, *op. cit.* p. 62.

<sup>3</sup> *Dig.* 1, 3, 1, and 1, 3, 35.

period of the French Revolution, the history of politics, whether in theory or in practice, could not possibly be understood without some knowledge of the Roman law and its effects.

### III

That Economics are closely connected with both Politics and Law is strikingly illustrated by the fact that *The Wealth of Nations* was an expansion by Adam Smith of one-third of a course of lectures, the other two-thirds of which dealt, first, with Public Jurisprudence, and secondly, with Domestic Law.<sup>1</sup> Mr. Ruskin has expounded the Political Economy of Art, but the Political Economy of Law is too obvious to need pointing out. Roman also has, however, a special value for the student of Economic History, because its records are practically his only source of information for a most important period. Professor Ramsay has explained the difficulty of investigating social and economic facts under the Empire. "Historians," he says, "are so occupied with the great events, the satirists so busy with the vices of upper-class society, the moralists with abstract theorizing, the poets with Greek mythology, and with the maintenance of their footing in the *atria* of the rich, that they have neither time to write about the aims of imperial policy, nor eyes to see them." "Here," he adds, "we must trust to our second class of authorities, the inscriptions and the laws."<sup>2</sup>

No reader of the *Digest* can fail to have been struck with its wonderful collection of little vignettes—one might almost say snap-shots—illustrating social conditions under the Empire. We catch vivid glimpses there of capitalists, tenant-farmers, artisans, slaves, freedmen, and even chil-

<sup>1</sup> Cannan's edition of A. Smith's *Lectures on Justice, Police, &c.*, 1896.

<sup>2</sup> Ramsay, *The Church and the Roman Empire*, p. 184.

dren. We see them driving up the *Clivus Capitolinus* or playing ball, as well as buying or selling or making their wills. It is a great storehouse of social data, and we may be thankful that the tough casing of the law has preserved them. Moreover we now enjoy the light which of late years has been shed on them by archæologists and epigraphists. Facts as to taxation, administration, imperial and municipal finance, the conduct of shipping and other industries, may all be found in that mine which Mommsen and Marquardt have so brilliantly exploited.<sup>1</sup> But the value of the collection to the economic historian may perhaps best be illustrated in two instances, banking and the organization of labor.

The *Digest* is full of information about bankers and banking. It has been pointed out that the Roman Empire, especially after the time of Caracalla, suffered from lack of means for accumulating capital, owing to the scarcity of bullion and the insufficiency of banking facilities.<sup>2</sup> While these conditions doubtless existed, and it is certain that the credit system was crude and primitive compared with that of the present day, yet we can see in the *Digest* that the functions of the Roman *argentarii* must have considerably relieved the strain on the metallic currency. This was partly recognized at the time, for the banking business is expressly stated to be of public utility; and since the recent excavation of the Basilica Aemilia in the Forum, where the principal banking-offices were situated, and the marble pavement of which is still strewn with remains of their coins, we know that in Rome, at least, the state provided well for their comfort. It is safe to infer, from the silence of the *Digest*, that even its compilers in the sixth century had never heard of negotiable instruments or of bills pay-

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<sup>1</sup> See especially Marquardt, *Röm. Staatsverwaltung*, vol. I, pp. 165-268.

<sup>2</sup> Cunningham, *Essay on Western Civilization*, p. 183.

able to bearer; yet the bankers of the Empire did many things to facilitate commercial transactions. They received money on deposit in the modern way, the sum deposited becoming a debt due to the depositor, and they made payments for his account on his written order. They could transact for a client all sorts of sales, collections, investments, and other business, make loans on his behalf, and issue drafts on correspondents in other cities. When Cicero sent his son to Athens, he provided him with means of drawing money when he got there, though we cannot suppose that he gave him a bill of exchange. He probably got from his banker an order on some Athenian bank, or else bought a debt payable in Athens. Branch banks could be managed by agents or by slaves, and we know that the banker might have his head office in one province and carry on business in another.<sup>1</sup> The best evidence, perhaps, of the importance and variety of the banker's functions appears in the elaborate legal rules dealing with the production of his books and the statement of his accounts, and filling many paragraphs in the *Digest* and *Code*.<sup>2</sup>

It is from these same sources, as well as from the Theodosian Code and from a great array of inscriptions, that we derive our knowledge of the Roman workingman's clubs and trade-unions. The inscriptions have not only supplied many details not found in the books, but they show to what an extent free labor flourished all over the Empire, even in competition with slavery. Under the Republic trade associations grew strong and had much influence in politics, for Cicero constantly mentions them, and was advised by his friends to bid for their vote. Indeed, their power became so great, during the anarchical times of the later Republic, that they were twice suppressed by the Senate and

<sup>1</sup> *Dig.* 2, 13, 4, 5. See Gullhard, *Les Banquiers à Rome*; Deloume, *Les Manieurs d'argent à Rome*.

<sup>2</sup> *Dig.* 2, 13; *Cod.* 2, 1.

again by Julius Cæsar and Augustus. These last prohibitions did not, however, apply to associations that were old established or legally authorized. While we have not full particulars as to the senatorial and imperial legislation, it seems clear that besides Religious Clubs, Burial Societies, and Poor Men's Benefit Clubs, the law recognized, or at least tolerated, a great many workingmen's societies closely corresponding to the trade-unions of the present day.<sup>1</sup> Each trade seems to have had its own association. There were separate unions of carpenters, masons and stonecutters, of fishermen, sailors, boatmen and mule-drivers, of carriage-builders, carpet-weavers and cutlers, of butchers, poultry-dealers, cooks, laundrymen and tailors; in short, we find no less than one hundred different trades in which associations appear to have existed.<sup>2</sup> There is no evidence of federation having been attempted among similar unions in different cities, but the large unions had local subdivisions. Thus the building carpenters of Rome had about twelve hundred members divided into sixty *decuriæ*. The unions were organized on the principle of industrial democracy, and could enact any by-laws not conflicting with the general law. Their revenues were considerable, as evidenced by the way in which they spent them and by the fact that their meeting-halls (*scholæ*) were substantial, even sumptuous, buildings. We cannot tell whether they ever aimed at limitation of apprentices, trade monopoly, or the enforcement of a minimum wage or of the "union shop," but there can be no doubt that their object was then, as it is now, to strengthen the position of the workingman and to enable him in various ways to improve his condition. Thus a law-suit was carried on by the Roman laundrymen against the imperial fisc for the possession of a valuable plot of land,

<sup>1</sup> The most complete discussion of this subject is that of Waltzing, *Etude hist. sur les Corporations Professionnelles*, Brussels, 1895.

<sup>2</sup> See list in Waltzing, vol. II, p. 148.

and the laundrymen were victorious after eighteen years of litigation.<sup>1</sup> As to strikes we have few particulars, and though we know they occurred, we cannot tell what were their effects. If they tended to disturb the peace, they were no doubt sternly suppressed by the Roman magistrates, as happened in one strike of which an account has been preserved.<sup>2</sup> But of all the vicissitudes of the Roman unions the most fully described and the most interesting is that socialistic system of state control depicted in the Theodosian Code, under which they passed in the fourth century. Under this system every artisan was compelled to enlist in the union of his trade, and each union became virtually a branch of the state's administrative machinery. For facts such as these the economic historian is indebted partly to the archæologist, but chiefly to the civil lawyer.

## IV

To any student of the early history of Roman law, its connection with the history of Religion must be evident. We cannot tell exactly what form of punishment is referred to in the words *sacer esto* of the laws of the Kings and the Twelve Tables, but it must have been of a religious character, and there can be little doubt that the earliest sanction of contract was the displeasure of the gods. *Sponsio*, *sacramentum*, *iusiurandum* all had a religious origin, and the last of these remained to the very end religious in form. Even as late as the time of Justinian, when there were so many different ways in which contracts could be made, it is astonishing to see how much the oath was still resorted to as a mode of making a binding promise. Its original sanction doubtless was that the perjurer became *exsecratus*, cut off from the sacred rites of his family, but by Justinian's

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<sup>1</sup> *Ibid.* vol. 1, 188.

<sup>2</sup> *Ibid.* vol. 1, p. 192.

time the breach of an oath gave to the promisee an ordinary civil right of action.<sup>1</sup>

Again it is well known that, just as the ethical ideals of the Stoic philosophy affected the development of Roman law in the first, second and third centuries, so the religious ideals of Christianity exerted an even greater influence upon it from the fourth century to the sixth. This meant on the whole an improvement of the law in the direction of increased humanity and equality, except in the law of persons. There we find, in the disabilities attached to Jews, pagans, and heretics, differences based on religion making their appearance for the first time in Roman law. On the other hand, by bettering the condition of slaves and of women, by mitigating the *patria potestas*, and by the gradual abolition of the rights of agnates which culminated in the famous one hundred and eighteenth Novel of Justinian, the Christian heaven worked with salutary effect.<sup>2</sup>

Still more interesting, however, and more far-reaching was the converse process, the modification wrought by the legal atmosphere of Rome in the religious rites and doctrines of Christianity. So far as I know, this subject has never yet received adequate treatment, which is the more strange because Sir H. Maine long ago drew attention to it in a famous passage.<sup>3</sup> But the field is an immense one, and a few points only can here be mentioned. As to ritual, it is scarcely necessary to recall the fact that the solemn questions put to the man and woman in the marriage service and to the sponsors in the baptismal service, which still survive in the English Book of Common Prayer, were framed in the contractual form peculiar to Roman law. Richard Hooker, to whom the use for such a purpose of

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<sup>1</sup> *Dig.* 13, 5, 25, 1.

<sup>2</sup> Troplong, *Influence du Christianisme sur le Droit Civil*. Lea, *Studies in Church History*. Osborn, *Classical Heritage of the Middle Ages*.

<sup>3</sup> *Ancient Law* (11th ed.), p. 357.



this Roman form seemed quite natural and proper, explains to the English reader how the Roman verbal contract was made, and quaintly adds: "Is it toyish that the Church exacteth an irrevocable promise of obedience by way of a solemn stipulation?"<sup>1</sup>

In the development of Christian doctrine there appears a tendency similar to that which Matthew Arnold described in *Literature and Dogma*. Legal phrases and conceptions derived from Roman law, which were at first used metaphorically or by way of illustration, came by degrees to be used literally as dogmatic definitions. Thus the relation of God to man, from being viewed as a moral one based upon love and duty, came to be regarded in a strictly legal light.

It has often been pointed out that St. Paul, as befitted a Roman citizen, was fond of using metaphors drawn from the law of the Empire. As has been well said by a distinguished clergyman, "he construed Christ in mixed terms of Hebrew sacrifice and Roman law."<sup>2</sup> St. Paul uses the ceremony of adoption, the Roman conception of heirship, the Roman form of guardianship, the sealing of the prætorian will, in order to illustrate various aspects of God's dealings with man.<sup>3</sup> But he uses them as illustrations, not as clear-cut definitions. So also, when he speaks of the death of Christ as a ransoming or redemption of man from sin, he does so by way of showing in an eloquent figure of speech how man has been affected by Christ's influence and example, rather than as defining a legal function performed by Christ.

When we pass to the works of Augustine, Ambrose, Origen, Athanasius, and other Fathers of the Church, we find the idea of Christ's work for man beginning to harden

<sup>1</sup> *Ecclesiastical Polity*, 5th book, sect. 64.

<sup>2</sup> McConnell, *Christ*, p. 54.

<sup>3</sup> Ball, *St. Paul and the Roman Law*.

into that of the performance by Him of a legal service.<sup>1</sup> This was regarded as one of two legal transactions; either (1) as *satisfactio*, paying off the debt which man, an insolvent debtor, was himself unable to pay, and canceling the chirograph made by man; or (2) as *redemptio*, buying man back from the slavery in which Satan held him. But for theological purposes these two different aspects of the Atonement were treated as one and the same.

Pelagius and St. Augustine in the fifth century had a famous controversy over the effects of Christ's sacrifice, and so had Abelard and St. Bernard seven centuries later. In both cases the orthodox doctrine prevailed, that men could not become partakers of the Kingdom of Heaven unless their debts were wiped out through the satisfaction offered by Christ.<sup>2</sup>

St. Anselm of Canterbury, who had studied the civil law, and who lived just at the time of the great legal revival, seems to have been the first great Christian writer who elaborated the dogma that, as part of a scheme ordained from all eternity whereby God's justice should be satisfied and man's sin pardoned, God had become man in order to satisfy by His death a debt which the human race had heaped up, but could not pay. This strictly legal view was elaborated by the Thomists and Scotists in their disputes over *satisfactio superabundans* and *satisfactio gratuita*, and at the Reformation it was appropriated by the Reformers, who quite logically insisted upon it as a strong argument against the Papal system of penance and indulgences. Luther said "by none other sacrifice or offering could God's fierce anger be appeased but by the precious blood of the Son of God"; and the poet of Puritanism has stated its doctrine in the gloomy lines:

<sup>1</sup> See extracts from the Fathers in *Bibliotheca Sacra*, vol. 36, p. 441.

<sup>2</sup> Voss, *Hist. Pelagian*, lib. 7, 1, thesis 3, and his *Responsio ad Judicium Ravenspergii*, cap. 3.

"Die he or justice must; unless for him  
Some other able, and as willing, pay  
The rigid satisfaction; death for death."

To what legal extremes this theory of atonement was carried at the Reformation is nowhere better shown than in the Defence of the Catholic Faith which Grotius wrote against Socinus.<sup>1</sup> Socinus had argued that where there was satisfaction of a debt there could be no need for any remission of that debt by God. Grotius answered him with citations from the *Digest*. He admitted that Socinus's contention would have been true if the legal service performed by Christ had been *acceptilatio*, *novatio*, or *delegatio*. But inasmuch as that service was in law quite a different transaction, and since the obligation incurred by man had not been canceled by Christ, but merely suspended through the working of *satisfactio*, Grotius argued that there was still room for the exercise of God's mercy in completely doing away with man's liability.<sup>2</sup>

It would be interesting to trace the whole history of this famous dogma, perhaps the strongest though by no means the only instance of legal influence on Christian religious thought; but in so short a sketch details must needs be omitted. The doctrine figured conspicuously in the teaching of Wesley, whose constant cry was: "Plead thou singly the blood of the Covenant, the ransom paid for thy proud stubborn soul," and through him it has played a great part in modern Protestantism. While it may be true, in the recent words of an English clergyman, that "theories of atonement are now either rejected or in process of being rejected,"<sup>3</sup> St. Anselm's legal doctrine still numbers many adherents.

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<sup>1</sup> Socinus, *De Christo Servatore*, pars. 3, cap. 1-6.

<sup>2</sup> Grotius, *Def. Fidei Cath.* cap. 6.

<sup>3</sup> Canon Henson, *Value of the Bible*, p. 279.

## V

The history of Roman law is clearly connected with that of Literature, yet it can scarcely be shown that either has had much share in actually moulding the other. It can of course be maintained that the high development of Roman law and the fascination which it exercised on the best Roman intellect during the zenith of the Empire are mainly accountable for the differences between Greek and Roman literature, particularly for the poverty of the latter in philosophical writings. But except for that general effect the relation between law and literature at Rome is on the whole one of interpenetration, rather than of direct action and reaction. We can interpret each by the help of the other, but we cannot, at least in secular literature, establish any filiation between them. The technical phrases used by Horace or Juvenal bring out the legal element in literature, just as the polished style of Labeo or Gaius illustrates the literary element in law. But Horace cannot be connected with the controversies of the Sabinian and Proculian Schools, nor can we trace Juvenal's remark, *Res fisci est, ubicunque natat*,<sup>1</sup> to the inspiration of any particular jurist. No literature can be fundamentally understood without understanding the laws of the country that produced it, and this is particularly true of Rome, because law was her chief intellectual pursuit. On the other hand, the writings of the Roman jurisconsults, being couched in a style of extraordinary elegance and precision, are not only entitled to claim that literary taste is requisite for their appreciation; they represent in themselves a distinct branch of literature, a branch in which they have probably never been excelled.

The fact that law and literature can be interwoven is

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<sup>1</sup> *Sat.* 4, 55.

proved in Aristophanes and the Attic orators, as well as in many more modern instances, but no better examples can be found than in Latin literature. Several of Cicero's orations would be hopelessly puzzling if it were not for our knowledge of Roman law, just as the *Fasti* of Ovid would be full of difficulty unless we knew something about Roman religion. The same may be said of many passages in the plays of Terence and particularly of Plautus. Volumes have been written, especially in recent years, to explain how the law serves to elucidate those passages, and how they serve even to better purpose in elucidating the law. For just as the *Fasti* throw more light on Roman religion and topography than we receive from the historians of Ovid's age, so it is certain that we derive more knowledge of the early history of Roman law from information incidentally conveyed by literary men like Livy, Cicero, and Plautus than we do from facts intentionally imparted by scholars like Varro. For any acquaintance with early law Latin literature is indeed indispensable. And in later times, as we noted above, Roman law becomes in turn absolutely essential for the proper understanding of religious literature.

## VI

The intimate connection between the history of Roman law and that of Language seems scarcely to need pointing out, when our every-day speech is constantly and openly confessing its many obligations to that law. This very word obligation, borrowed from a "vocabulary of art" devised by the Roman jurists, is a word the history of which is impossible to trace till we go back and discover how they formed it and in what sense they used it. The same is true of nouns such as person, privilege, prejudice, occupation, exception, sequestration, confusion; of adjectives such as peremptory, mandatory, specific; and of verbs such as

adopt, redeem, emancipate. All these are derived from technical terms familiar to the Roman jurists, yet their meaning has undergone such change in the course of ages that their legal origin is quite forgotten. A long list of similar words in our modern vocabularies could be made by simply working through an English, French, or even German dictionary. Some terms, again, such as usufruct, plebiscite, manumission, servitude, have passed from Roman into modern terminology without material change in their original sense; while other nouns, such as solidarity, have been taken, not from legal nouns, but from technical adjectives.

Not only must we seek in Roman law the parents of many of our words; there are some also of which the genealogy can be traced through many gradations of meaning even in the hands of Roman lawyers. For instance, their word *humanitas* signifies in different passages: (1) human nature, (2) sensibility, (3) kindness, (4) compassion; while *pictas* denotes in different legal texts: (1) sense of duty based on family ties, (2) conscientiousness shown by an employee, (3) the feeling expected from a Christian toward his church and its members. Nor does this enumeration by any means exhaust all the shades of meaning given by Roman lawyers to those two words.<sup>1</sup>

It should also be remembered that among the most important contributions to the history of Roman law are the curious details and the citations from ancient texts which have been preserved by Roman students of the science of language, such as Varro and Festus. They alone have saved from oblivion, as one may see fully set forth in the pages of Bruns, much antiquarian lore invaluable to the legal historian. Even the best Roman lawyers were also dabblers in philology, as we can see from the derivations

<sup>1</sup> Krüger, *Z. der Sav. Stift. für RG*, vol. 19, 1888, p. 6.

of legal terms which Gaius and others have handed down to us. Though their efforts in this line savor of the famous derivation of Erie Canal from Eridanus, they are valuable as showing their authors' point of view. Nor does this comprehend all the services of the philologist to legal history. For in comparative jurisprudence it has been shown, as for instance by the present Regius Professor of Civil Law in the University of Cambridge, that by tracing the etymology and analyzing the use of words like *fas*, *ius*, *lex*, and their Greek and Teutonic equivalents, much historic light can be thrown on the earliest conceptions of law as unconsciously defined in language.<sup>1</sup>

Thus by investigating etymologies, by tracing obsolete or obscure shades of meaning, and by the preservation of rare antiquities, linguistic scholars both ancient and modern have greatly helped the legal historian. The civil lawyer has on his part supplied to the student of language an immense mass of material of well-authenticated date and authorship, filled with terms from which have directly descended many of the words now used not only by the Latin but also by the Teutonic race.

## VII

There are two main facts connecting the history of Law and that of Art in any given place. The first is that times of great legal activity or legal reform almost always coincide with periods of flourishing art. This may doubtless be accounted for by the fact that law and art are expressions of the same human intellect, and when that intellect is roused to energetic action in one form, it usually is so in others also. The second point is that architecture, sculpture, and painting must inevitably treat in some measure of subjects connected with the law of their country. Any

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<sup>1</sup> Clark, *Practical Jurisprudence*, part I, chaps. 1-6.

one of those arts may convey legal allusions, just as it may suggest religious or political ideas, and in order to understand those allusions we have to know something about law, politics, or religion, as the case may be. Both points can be well illustrated from the history of Roman law.

In the first place, there can be no doubt that the most glorious epoch in that history, beginning with the jurists of the Augustan age and ending with those under the Antonines, Septimius Severus, and Caracalla, was also the golden age of Roman architecture and sculpture. For the art of the Augustan period it is enough to cite that wonderful *Ara Pacis*, whose fragments are scattered among several European museums, and the remains of which are now being unearthed under a Roman palace. And the second of those two great centuries was, so far as we are able to judge, the period of culminating splendor both in law and in art. Trajan and Hadrian, so great as legislators, have each left us one of the magnificent monuments of antiquity, a sculptured column in the one case, and a colossal tomb in the other. The memory of Marcus Aurelius, in whose day Roman society was so intensely civilized and modern, has been preserved for us not only by the *Code* and *Digest*, but by famous Roman works of art both in bronze and in marble. To Septimius Severus we owe a splendid arch, to Caracalla the remains of still more splendid public baths; and it should be remembered that Julia Domna, the wife of the former and the mother of the latter emperor, brought together in her brilliant *salon*, not only the best philosophers, orators, scholars, poets, and artists that the world could then produce, but also the greatest of Roman jurists, Paulus, Ulpian, and Papinian.<sup>1</sup> By the time of Constantine we note a decline in artistic no less than in legal achievement. Again, when legal activity re-

<sup>1</sup> Réville, *La Religion à Rome sous les Sévères*, p. 201.



vives under Justinian the codifier and reformer, we have his superb and well-preserved architecture at Ravenna and Constantinople to set beside his even more enduring legal monuments. After him both art and law fall into a kind of lethargy, until again, and surely not by accident, the legal revival during the twelfth, thirteenth, and fourteenth centuries takes place in the same wonderful period which produced the early Italian artists. And once again a second renewal of interest in the study of Roman law, with which the great Cujas is identified, coincides with the revival of classic art in the Renaissance. There seems, in short, to have been a sort of tidal movement in the European mind, by which the history of art and that of law have equally been affected.

When we come to consider the legal allusions in art, for the understanding of which a knowledge of legal history is requisite, we stand on ground less easy to survey. For here we find nothing but isolated details, each of which has to be separately examined. A knowledge of legal history is sometimes useful in clearing up a question of ancient architecture. Thus the basilica found in Domitian's palace on the Palatine could not be appreciated unless we knew the Emperor's legal position as final court of appeal. Similarly, the churches built in the catacombs could not be understood unless we knew that the law forbade burial inside Rome, while it also protected all resting-places of the dead, and that it thus quite unintentionally pointed out the catacombs as excellent sanctuaries for a persecuted sect. Sometimes the history of Roman law may help us to understand sculpture. In Bologna, Padua, and even Siena we find wonderful semi-regal tombs erected to the memory of thirteenth or fourteenth century jurists. They stand in a public place covered with splendid canopies of stone, or they rest against the wall of a church, each decorated with

a marble bas-relief which represents the great scholar sitting, book in hand, giving a lecture to his class of pupils. These beautiful monuments would mean but little to us, unless we knew from legal history how great was the fame in his own day of an Accursius or a Bartolommeo di Saliceto, and how the revival of civil law in Italy produced a long succession of such teachers, whose labors brought not only renown but wealth to the cities where they taught.

For understanding the work of painters some knowledge of this sort is even more needful. In the great Florentine chapter-house of Santa Maria Novella, which Ruskin has so elaborately described, there is a fresco depicting the seven divine sciences personified by as many female figures. Beneath the figure which represents the science of Civil Law sits the Emperor Justinian. She carries a sword and a globe, while he holds in his hands the *Institutes*. No one could appreciate the point of this personification unless he knew the position of Roman law in medieval Italy and the reverence with which Justinian was regarded, a reverence to which Dante in his *Paradiso* has borne witness. Again in the Sala della Segnatura in the Vatican, we find, among frescoes representing religious scenes, such as that of Moses giving the Tables of the Law, a great fresco by Pierino del Vaga which sets forth the delivery of the *Code* by Justinian to Tribonian. This is matched by another fresco which depicts Pope Gregory handing down the *Decretals*. To understand these subjects we must know something of the causes which led men to regard the civil and canon laws as the very foundation-stones of justice.

In other cases we find inscriptions to interpret. For instance, in the Sala della Segnatura Raphael has written *Rerum divinarum notitia* over the head of his Theology, and *Ius suum unicuique tribuens* over the head of his Justice, thus quoting directly from Ulpian and the *Institutes*.

Similarly Ambrogio Lorenzetti, in his great fresco of the Sienese Council Chamber, places two angels labeled *Distributiva* and *Commutativa* above his female figure personifying Justice, and thus refers to St. Thomas Aquinas and Aristotle. Here we need Roman Law to explain the one inscription and Philosophy to explain the other, just as for the great mosaic of the Lateran Triclinium the history of Politics can alone furnish an adequate commentary.<sup>1</sup>

After this brief and most imperfect survey of the relations existing between Roman law and other sciences we may perhaps ask ourselves why it is that we find its remains and trace its influence in so many different quarters. To this question a reply is furnished by two historical facts.

First, the vitality of the Roman Empire was such that it lasted actually for a thousand years in the East, and theoretically much longer still in the West of Europe. Secondly, the law created by it, being a purely intellectual product, was even more lasting than the Empire itself; so that the barbarians, who destroyed the outward and visible signs of the Roman power, were themselves subjugated by its inward and spiritual grace. Inasmuch, then, as Roman law was the most durable material in that vast imperial edifice the ruins of which so long overshadowed Europe, we can well understand that its fragments should be incorporated into almost all the lesser structures which have since been reared by the mind of Western peoples.

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<sup>1</sup> Bryce, *Holy Roman Empire* (8th ed.) p. 117.



# JURISPRUDENCE: ITS DEVELOPMENT DURING THE PAST CENTURY

BY JOSEPH HENRY BEALE, JR.

[JOSEPH HENRY BEALE, JR., Bussey Professor of Law, Harvard University. b. Dorchester, Mass., 1861. A.B. Harvard, 1882; A.M. *ibid.* 1887; LL.B. *ibid.* 1887; LL.D. University of Wisconsin, and University of Chicago. Professor of Law, Harvard University, University of Chicago, and Dean of the Law School. AUTHOR OF several legal treatises and books of cases for the use of students of law.]

## I. *Introduction*

THE term "jurisprudence" has been used with so many meanings and each meaning is so vague, that it is necessary at the outset of any discussion of it to limit in some way the meaning intended to be put upon it. By jurisprudence, as used in the programme of this Congress, I understand to be meant the whole body of law of the European and American nations, regarded as a philosophical system or systems; in short, the science of justice, as practiced in civilized nations. My own topic, therefore, is to describe the changes in the law or in the understanding of law in the civilized world during the past century.

So broad a subject cannot, of course, be treated exhaustively nor can any part of it be examined in detail. My effort will be merely to suggest, in case of a few branches of law where the changes seem to be typical, the course and reason of the changes.

## II. *General Description of the Amount of Change*

If we compare the condition of the law at the beginning of the century with its present condition, we shall gain

some idea of the amount of change in the law itself and its administration. In England conservatism and privilege and the dread inspired in the heart of the people by the excesses of the French Revolution conspired to retain in the law the medieval subtleties and crudities, though the reason of them had been forgotten and the true application of them often mistaken. The criminal law was administered with ferocity tempered by ignorance; all the anomalies and mistakes which have disfigured its logical perfection are traceable to the period just before the beginning of the last century. Criminal procedure was still crude and cruel. The accused could neither testify nor be assisted by counsel; death was the legal, a small fine or at most transportation the actual, punishment for most serious offenses. The amount of crime in proportion to the population was enormously greater than now; there were no preventive measures, no police, not even street lights. The law of torts occupied almost as small a place as it did in the proposed codes; the law of contracts was so unformed that it was not certain whether Lord Mansfield's doctrine that a written commercial agreement needed no consideration would prevail or not. Business corporations were hardly known; almost the whole field of equity was hidden by a portentous cloud. Lord Eldon had just become chancellor. What the law of England was, such with little difference was the law of our own country. Its application to the complex life of the present was not dreamed of; and it must be greatly changed before it could be adapted to the needs of the present. Yet to say of it, as did Bentham, that it was rotten to the core and incapable of amendment, was grotesquely incorrect; to say as one of his latest disciples did that it was the laughing-stock of the Continental nations is strangely to misread history. In 1803, with all its imperfections and crudities, it was proba-



### JUSTINIAN IN COUNCIL

*Photogravure from the Painting by Jean Joseph Benjamin-Constant.*

This famous painting was originally exhibited in the Paris Salon of 1888, and was presented in 1890 by G. Mannheimer to the Metropolitan Museum of Art in New York. Justinian, surnamed the Great, was the last Emperor of Constantinople, who in the sixth century, by his dominion over the whole of Italy, reunited in some measure the ancient Empire of the Cæsars. The glory of his reign is the famous digest of Roman law, known to fame as the Justinian Code. The scene depicted in Benjamin-Constant's painting is a slave reading before Justinian and his Cabinet some portion of this celebrated code.







bly the most just and humane system of law under which human beings were then living.

On the Continent, feudal rights characterized civil law; torture was the basis of the administration of criminal law. And in no country of any size had the people yet obtained what had been given to Englishmen by their greatest king more than six hundred years before,—a common law. Each province throughout southern and western Europe had its custom, each land-owner his own jurisdiction. The rigor of the criminal law had been somewhat modified in France by the legislation of the Revolution, and just at the beginning of our century the Civil Code, first of the French codes, was adopted. These codes, temporarily or permanently impressed on a large part of Europe outside of France, constituted the beginning of modern legislative reform.

### III. *General Direction of Change*

The spirit of the time molds and shapes its law, as it molds and shapes its manner of thought and the whole current of its life. For law is the effort of a people to express its idea of right; and while right itself cannot change, man's conception of right changes from age to age, as his knowledge grows. The spirit of the age, therefore, affecting as it must man's conception of right, affects the growth both of the common law and of the statute law. But the progress toward ideal right is not along a straight line. The storms of ignorance and passion blow strong against it; and the ship of progress must beat against the wind. Each successive tack brings us nearer the ideal; yet each seems a more or less abrupt departure from the preceding course. The radicals of one period become the conservatives of the next, and are sure that the change is

a retrogression; but the experience of the past assures us that it is progress.

Two such changes have come in the century under consideration. The eighteenth had been on the whole a self-sufficient century; the leaders of thought were usually content with the world as it was, and their ideal was a classical one. The prophets of individuality were few and little heeded. But at the end of the century, following the American and French revolutions, an abrupt change came over the prevailing current of thought throughout the civilized world; and, at the beginning of the period under discussion, the rights of man and of nations became subjects not merely of theoretical discussion, but of political action. The age became one of daring speculation. Precedent received scant consideration. The American Revolution had established the right of the common people to a voice in the government. The French Revolution had swept feudal rights from the civilized world. The French Republic was, to be sure, just passing into the French Empire; but it was an empire which belonged to the people, and one of which they were proud. The Emperor was the representative and the idol, not of an aristocracy, but of his peasants and his common soldiers. The dreams of Napoleon himself, to be sure, were not of an individualistic paradise, where each man's personality should have free play and restraint on his inclinations be reduced to the minimum; but so far as he was able to put his centralizing ideals into execution he raised but a temporary dam, which first spread the flood of liberty over all Europe and was finally swept away by the force of the current.

Starting from this point, the spirit of the time for more than a generation was humanitarian and individualistic. In political affairs independence was attempted by almost every subordinate people in the civilized world, and was

attained by the South American colonies, by Greece, and by Belgium. In religion free thinking prevailed, and every creed was on the defensive. In society women and children were emancipated. Slavery was abolished and the prisons were reformed. It was rather a destructive than a constructive age, and its thinkers were iconoclasts.

But a change, beginning with the second third of the century, was gradually accomplished. The application of the forces of steam and electricity to manufacture and transportation has had a greater effect on human life and thought than any event of modern times. The enormous power exerted by these forces required great collections of labor and capital to make them effective. Association became the rule in business affairs, and as it proved effectual there, the principle of association became more and more readily accepted in social and political affairs, until it has finally become the dominating idea of the time. The balance has swung; the men of our time are more interested in the rights of men than in the rights of man; the whole has come to be regarded as of more value than the separate parts. Beginning with the construction of railroads, the idea attained a firm standing in politics in the sixties. Whereas, before that time, the movement had been toward separation, now it was toward consolidation. People felt the tie of nationality stronger than the aspiration for individual development. The unification of Italy and of Germany, the federation of Canada, the prevalence of corporate feeling in America which, first passionately expressed by Webster, prevailed in 1865, mark the principle of association in political affairs. In business, the great combinations of capital have been the salient features of the change.

Professor Dicey, in a most suggestive series of lectures a few years ago, pointed out many ways in which the English

law had been affected by this progress of thought during the nineteenth century; but since the thought of the whole world has been similarly affected we should expect to find, and we do find, that not merely English law but universal jurisprudence has developed in the direction of the progress of thought: during the first period in the direction of strengthening and preserving individual right, both of small states and of individuals; in the second period in the direction of creating, recognizing, and regulating great combinations, whether of states or of individuals. Let us develop this line of thought by examining the progress of law in a few striking particulars.

#### IV. *International Law*

The most striking development of the law of nations during the last century has been in the direction, if I may so call it, of international constitutional law rather than of the substantive private law of nations. At the beginning of the period, the fundamental doctrine of international law was the equality of all states, great or small, and this idea, as one might expect, was fully recognized and insisted on during the first fifty years of the century. There was little development in the law otherwise. Each nation adopted and enforced its own idea of national rights, and was powerless to force its ideas upon other nations; when, at the beginning of the century, France set up her absurd notions of her own national rights, the other nations were powerless to restrain or to teach her. There was no international legislature or court; no method of declaring or of developing the law of nations. Each state was a law to itself giving little more than lip service to a vague body of rather generally accepted principles. The alliance to conquer Napoleon, to be sure, brought several great nations into a com-

mon undertaking, but this alliance, while of political importance, added nothing to the development of the law.

In the last half of the century, however, there has been an enormous development of combinations, both to affect and to enforce law; and resulting therefrom a development of the substance of the law itself. The associations of civilized nations to suppress the slave trade both made and enforced a new law. The concert on the Eastern Question, the Congress of Paris, the joint action of the powers in the case of Greece and Crete, and in the settlement of the questions raised by the Russo-Turkish and Japanese wars, the Geneva and Hague conventions, are all proofs of the increasing readiness of the great powers to make, declare, and enforce doctrines of law, and they have not hesitated, in case of need, to make their action binding upon weaker states, disregarding, for the good of the world, the technical theory of the equality of all states. While all independent states are still free, they are not now regarded as free to become a nuisance to the world. Perhaps the most striking change in the substance of international law has been the extraordinary development of the law of neutrality. A hundred years ago the rights and the obligations of neutrals were ill defined and little enforced. To-day they form a principal theme of discussion in every war; and the neutral nations, for the good of the whole world, force the belligerents to abate somewhat from their freedom of action.

It may be worth while, in order to see how far this constitutional change has progressed, to look for a moment at the present condition of the constitutional law of nations. We have, in the first place, a body of states known as the "Great Powers," which have taken to themselves the regulation of the conduct of all nations. In this hemisphere the United States is sponsor for all the smaller independent nations. In Europe the Great Powers exercise control

over the whole of Europe and Africa, and a large part of Asia, while in the extreme Orient, Japan seems likely to occupy a similar position to our own in the Western hemisphere. The constitutional position of this confederation of powers is not unlike that of the states of the American Confederation of 1780, and in certain ways it is even further developed. Its legislation is not in the hands of a single permanent congress, but it is accomplished by mutual consultation. For action, as Lord Salisbury once informed the world, "unanimous consent is required," as was the case in our confederation. Executive power has been exercised several times, either by the joint show of force by two or more powers, or by deputing one power to accomplish the desired result. The judiciary, as a result of The Hague Convention, is much further developed than was that of the Confederation, even after 1781. All of this has been accomplished in fifty years, and the prospect of peace and prosperity for the whole world as a result of its further development is most promising.

### *V. Codification*

The progress that has been described is well indicated by the course of the movement for codification.

Just a hundred years ago the first of the French codes was adopted. These codes had two purposes, first to unify the law, which, before the adoption of the codes, had differed in every province and every commune of France; second, to simplify it so that every one might know the law. The first purpose appealed most strongly to lawyers and to statesmen. The second appealed to the people generally. Whatever reason weighed most with Napoleon, there is no doubt which made the codes permanent. The people of France, and of the other countries where they



were introduced, hailed them as creating a law for the common people. They persisted in most countries where they had been introduced by Napoleon's arms in spite of the later change of government; whether the country on which they had been imposed was Flemish, German, Swiss, or Italian, it retained the codes after the defeat of Napoleon, and they have remained almost the sole relic of his rule, the only governmental affairs which retain his name, and, except Pan-Germanism, the only lasting monument of his labor. They persisted because they were in consonance with the individualistic feelings of the times.

Bentham urged codification on England for the same reason.

"That which we have need of (need we say it?) is a body of law, from the respective parts of which we may each of us, by reading them or hearing them read, learn, and on each occasion know, what are his rights and what his duties."

The code, in his plan, was to make every man his own lawyer; and the spirit of individualism could go no farther than that. Conservative England would not take the step which Bentham urged; but a code prepared by one of his disciples upon his principles was finally adopted (by belated action) in Dakota and California, and was acclaimed as doing away with the science of law and the need of lawyers.

The result of the adoption of the French codes and the Benthamite codes has been far from what was hoped and expected. They were to make the law certain and thus diminish litigation and avoid judge-made law. That litigation has not been diminished by codification can easily be shown by comparing the number of reported cases in the states which have adopted the codes and in states which have not adopted the codes. As a result of this comparison, we find that France has over 15 volumes a year of reports

of decisions on points of law, 4 of them containing over 2500 cases each; England has about 10 volumes a year of reports of decisions on points of law containing about 900 cases. California has from 3 to 4 volumes of reports of decisions on points of law each year, 100 since the adoption of the Code in 1871; Massachusetts has 2 to 3 volumes of reports of decisions on points of law, 76 in all during the same period. As bearing on the avoidance of judge-made law, which, by a curious ignorance one is perhaps not quite justified in calling insane, Bentham regarded as inferior to legislature-made law, the result of the codes in one or two points will be instructive. The French code provided that all actions *ex delicto* should be decided by the court as questions of fact, without appeal for error of law. Notwithstanding this provision, recourse has been had to the Court of Cassation and a system of law has been built up on judicial decisions similar in character and comparable in amount to that built up in England in the same way during the same period. There is, for instance, a French law of libel which must be learned, not from the code, but from the pages of Dalloz and the *Pandectes Françaises*, just as our law of libel must be studied in the law reports and the digests. Even if a point is apparently covered by an express provision of the code, judicial decisions may affix a meaning to the provision which can only be known to a student of law. Thus the French code appears to lay down the proposition that capacity to contract is governed by the law of the party's nation, yet the French courts refuse to apply this principle and instead of it apply the French law of capacity in each case where the other party to the agreement is a Frenchman who acted *bona fide* or where the party to be bound was commorant and doing business in France. These are two examples only out of many that might be cited of the failure of the code to fulfill the hopes

of its individual sponsors. If we leave the French code and come to those in our own country, we shall find the same process going on. The law of California has been developed in much the same way since the adoption of the code as before, and the common-law decisions of other states are as freely cited by her courts as authority as if their own law had never been codified. The uncertainty and confusion caused by the adoption of the New York Code of Civil Procedure is a well-known scandal.

It is true that Bentham objected to the French code as imperfect and made upon the wrong principle, and that Field objected to the New York Code of Civil Procedure as finally adopted. These objections were most characteristic. Every codifier desires not merely a code, but his own code, and will not be satisfied with any other. Hence, it follows that no complete code can be adopted which would be satisfactory to many experts in law. Furthermore, no codifier will be satisfied to accept the judgment of a court or any body of other men upon the meaning of his code, nor to accept the interpretation of the executive department on the proper execution of the law. It will follow that each codifier of the Benthamite type must be legislature, judge and sheriff, and the logical result (like the logical result of all individualism carried to an extreme) is anarchy.

This failure of the hope of the individualistic codifiers and the change in the spirit of the age have affected our ideal of codification. The purpose of the modern codifiers is not to state the law completely, but to unify the law of a country which at present has many systems of law, or to state the law in a more artistic way. In other words, the spirit of the modern codifiers is not individualistic, but centralizing. Thus the modern European codes of Italy, Spain, and Germany were adopted in countries where a

number of different systems of law prevailed, and the purpose of codification in each state was principally to adopt one system of law for the whole country and incidentally to make the expression of the law conform to the results of legal scholarship. The same purpose is at the basis of the American Commission for the Uniformity of Legislation. The purpose of the English codifiers appears to be merely an artistic one. It cannot be better expressed than by the last great disciple of Bentham, Professor Holland. The law expressed in a code, he says, has "no greater pretensions to finality than when expressed in statutes and reported cases. Clearness, not finality, is the object of a code. It does not attempt impossibilities, for it is satisfied with presenting the law at the precise stage of elaboration at which it finds it; neither is it obstructively rigid, for deductions from the general to the particular and the competition of opposite analogies are as available for the decision of new cases under a code as under any other form in which the law may be embodied." "It defines the terminus *a quo*, the general principle from which all legal arguments must start."

"The task to which Bentham devoted the best powers of his intellect has still to be commenced. The form in which our law is expressed remains just what it was."

Such a code as he describes is really very far from the ideal of Bentham. It does not do away with judge-made law; it does not enable the individual to know the law for himself; its only claim is that it facilitates the acquisition of knowledge by the lawyer by placing his material for study in a more orderly and logical form. The cherished ideals of the reformers of a hundred years ago have been abandoned, and an ideal has been substituted which is quite in accordance with the spirit of our own times.

VI. *Individual Rights*

The most striking characteristic of the progress of jurisprudence in the first half of the century was its increasing recognition of individual rights and protection of individuals. Humanity was the watchword of legislation; liberty was its fetich. Slavery was abolished, married women were emancipated from the control of their husbands, the head of the family was deprived of many of his arbitrary powers, and the rights of dependent individuals were carefully guarded. In the administration of criminal law this is seen notably. At the beginning of the century torture prevailed in every country outside of the jurisdiction of the common law and the French codes, but torture was abolished in every civilized state during this period. Many crimes at the beginning of the century were punishable with death. Few remained so punishable at the end of fifty years. The accused acquired in reality the rights of an innocent person until he was found guilty. He could testify, he could employ counsel, and could be informed of the charge against him in language that he was able to understand; and, even after conviction, his punishment was inflicted in accordance with the dictates of humanity. Imprisonment for debt was abolished. Bankruptcy was treated as a misfortune, not a crime.

As with the emancipation of individuals, so it was with the emancipation of states. The spirit of the times favored the freedom of oppressed nations as well as of individual slaves. The whole civilized world helped the Greeks gain their independence. The American people hailed with touching unanimity the struggles of Poland and of Hungary for freedom, and even the black republics of the West Indies were loved for their name, though they had no other admirable qualities.

While there has been little actual reaction in the last half-century against this earlier development of the law in the direction of liberty, there have been few further steps in that direction. The zeal for emancipation has in fact spent its force, because freedom, quite as great as is consistent with the present state of civilization, has already been obtained. So far as has been any change of sentiment and of law in the last generation it has been in the direction of disregarding or of limiting rights newly acquired in the earlier period. France, which secured the freedom of Italy, threatens the independence of Siam; England, which was foremost in the emancipation of the slaves, introduces coolie labor into the mines of South Africa; America, which clamored for an immediate recognition of the independence of Hungary, finds objections to recognizing the independence of Panama and refuses independence to the Philippines. In the criminal law there has been no reform, though there has been much improvement since 1850. Married women have obtained few further rights, principally because there were few left for them to acquire, and while we have freed our slaves, we have encouraged trade-unionism. In short, the humanitarian movement of two generations ago, which profoundly affected the law of the civilized world for fifty years, has ceased to influence the course of jurisprudence.

## VII. *Association*

The most characteristic development of the law during the last fifty years has been in the direction of business combination and association. A few great trading companies had existed in the Middle Ages; the *Hanse* merchants, the Italian, Dutch, and English companies wielded great power. They were exceptional organizations and almost all had ceased to act by 1860. The modern form

of business association, the private corporation with limited liability, is a recent invention. Such corporations were created by special action of sovereign or legislature, in small though increasing numbers, all through the last century; but during the last generation every civilized country has provided general laws under which they might be formed by mere agreement of the individuals associated. Now the anonymous societies of the Continent, the joint-stock companies of England and her colonies, and the corporations of the United States, all different forms of the limited liability association for business, have engrossed the important industries of the world. Different countries are competing for the privilege of endowing these associations with legal existence. Corporations are formed in one state to act in all other states or in some one other state; or it may be anywhere in the world except in the state which gave them being; and so in the last fifty years an elaborate law of foreign corporations has grown up all over the civilized world. But the corporation is only one form of business combination which has become important. Greater combinations of capital have been formed, that is, the so-called trusts; great combinations of laboring men have been formed, the so-called unions; and the enormous power wielded by such combinations has been exercised through monopolies, strikes and boycotts. All these combinations have been formed under the law as it has been developed, and all are legal. Furthermore, the great business operations have come to depend more and more upon facilities for transportation, and great railroads and other common carriers have come to be equal factors with the trusts and the unions in the operations of modern business. The first effect, then, of the ideals of the present age upon the law is its development in the direction of forming great commercial associations into legal entities wielding enormous commercial power.

If such associations had been formed seventy-five years ago, the spirit of the age would have left them free to act as they pleased. Freedom from restraint being the spirit of the times, it would have been thought unwise to restrain that freedom in the case of a powerful monopoly as much as in the case of a poor slave. But at the present time we are more anxious for the public welfare than for the welfare of any individual, even of so powerful a one as a labor union or a trust, and in accordance with the genius of our age the law has developed and is now developing in the direction of restraint upon the freedom of action of these great combinations, so far as such restraint is necessary to serve the public interest. For centuries innkeepers and carriers have been subject to such control, though little restraint was in fact exercised until within the last fifty years. To-day the law not only requires every service company to refrain from discrimination and from aggrandizing itself at the expense of the public, but the trusts and the unions also are similarly restricted. The principle of freedom of action, the courts in all questions now agree, rests upon the doctrine that the interests of the public are best subserved thereby, and applies only so far as that is true. When freedom of action is injurious to the public, it not only may be but it must be restrained in the public interest. That is the spirit of our age and that is the present position of the law when face to face with combinations such as have been created in the last generation. An interesting example of restriction is that almost universally placed upon foreign corporations; in the competition of certain states for the privilege of issuing charters, great powers and privileges have been conferred, which were regarded as against the public policy of the states in which the corporations desired to act. Strict regulations for the action of such corporations have resulted, imposed in the European



countries usually by treaty, in England and America by statute.

### VIII. *Scientific Study of Law*

A summary of the history of jurisprudence in the last hundred years would be incomplete without a consideration of legal scholarship during the period, and of the results of the scientific study of law. The reformers of a hundred years ago were profoundly indifferent to the history of law. Bentham, the founder of so-called analytic jurisprudence, wished not to understand the existing law, but to abolish it, root and branch, and to build a new system, the principles of which should be arrived at merely by deductive reasoning. It seems to us now almost impossible that such a man should have believed himself more capable of framing a practicable and just system of law than all his wise predecessors, but Bentham was a marvel of egotism and self-conceit, and his reasoning powers were far from sound. He seems to have been incapable of understanding the nature of law. "If," he said, "we ask who it is that the common law has been made by, we learn to our inexpressible surprise that it has been made by nobody; that it is not made by King, Lords and Commons, nor by anybody else; that the words of it are not to be found anywhere; that, in short, it has no existence; it is a mere fiction; and that to speak of it as having any existence is what no man can do without giving currency to an imposture." Employing the same reasoning he would have concluded that justice, not being made by King, Lords or Commons, nor by anybody else, had no existence; that truth, since the words of it are not to be found anywhere, is a mere fiction. But these defects are too often found in reformers. The humanitarian age brought enormous benefits to the world, but its ideas were often ignorant, crude, and impracticable,

and needed to be modified by the better instructed minds of the present constructive age. While Bentham was at the height of his power, the historical school of jurists in Germany was beginning its great work. Savigny was already preaching the necessity of understanding the history of law before it was reformed. Mittermaier and Brunner were to follow and carry on the work of the master. The unity of the past and present, and the need of conforming the law of a people to its needs were among their fundamental principles. Bentham had said, "If a foreigner can make a better code than an Englishman, we should adopt it." Savigny said, with greater truth and knowledge of human nature, that "no system of law, however theoretically good, could be successfully imposed upon a people which had not by its past experience become prepared for it."

The impulse given to legal study by the work of Savigny and his school has in the last generation spread over the civilized world and profoundly influenced its legal thought. The Italians, the natural lawyers of the world, have increased their power by adopting his principles. In England a small but important school of legal thinkers have followed the historical method, and in the United States it has obtained a powerful hold. The spirit of the age here too has supported it. We are living in an age of scientific scholarship. We have abandoned the subjective and inductive philosophy of the Middle Ages, and we learn from scientific observation, and from historical discovery. The newly accepted principles of observation and induction, applied to the law, have given us a generation of legal scholars for the first time since the modern world began; and the work of these scholars has at last made possible the intelligent statement of the principles of law.

# SOME PROBLEMS OF INTERNATIONAL LAW

BY CHARLES NOBLE GREGORY

[CHARLES NOBLE GREGORY, Dean of the College of Law since 1901, State University of Iowa. b. Unadilla, Otsego County, New York, August 27, 1851. A.B. University of Wisconsin, 1871; LL.B. *ibid.* 1872; A.M. *ibid.* 1874; LL.D. *ibid.* 1901. Associate Dean of the College of Law, State University of Wisconsin, 1894-1901. Member and a Vice-President of American Bar Association; International Law Association; and one of the Vice-Presidents of its Antwerp Conference, 1903; Political Science Association. AUTHOR OF numerous legal articles in leading law publications of the United States and England.]

WHEN Hugo Grotius published his great work on international law he entitled it *Concerning the Law of Peace and War*. That obvious division of this great subject continues after the lapse of nearly three centuries.

"The law of war," says Professor Holland, "as is well known, consists of two great chapters, dealing respectively with the relations of one belligerent to the other and with the relations of each belligerent to neutrals."<sup>1</sup> He goes on to show that the former has been discussed for at least six centuries, not to mention classical antiquity. The latter is comparatively modern, dating as a separate subject only from the eighteenth century, "though it has already come far to surpass in complexity and importance the law of belligerency."

It is with some problems in this surpassing branch of the law of war, "the relations of each belligerent to neutrals," that we wish to deal.

## *The Treatment of Neutral Blockade Runners*

In discussing in print during the last year the law of blockade, the writer said that while "the older writers approved of the corporal punishment of the blockade-runner,"

<sup>1</sup> *Studies in International Law*, by T. E. Holland (Oxford, 1898), p. 113.

yet "this is now wholly obsolete, and a confiscation of the ship, and, by the rule of infection, of any cargo belonging to the ship-owner, and of any portion of the cargo belonging to an owner cognizant of the blockade or who makes the master his agent, is the sole punishment."<sup>1</sup>

A very eminent and gifted English judge, whose name has for two generations been especially and most honorably identified with public law,—Sir Walter Phillimore,—by letter, courteously discussing the proposition, suggested to the writer that the rule could hardly be considered as settled; that it must be held at least in doubt. Sir Walter cited the practice of the United States in the war with the Confederacy, and especially the imprisonment of the late Sir William Allan, M. P., and his published reminiscences of the same. Sir William, by birth a Scotchman, lived for years in the United States, but returned to his native country and was later captured by a United States cruiser in Savannah Harbor while serving as chief engineer on a vessel engaged in running the blockade. He was held in prison for six weeks, until he bribed a sentry to take a letter to Lord Lyons, British Minister at Washington, and was then released on parole.<sup>2</sup>

Unfortunately, I have been unable to find Sir William's published reminiscences. Neither is the State Department nor the Navy Department able to refer me to the facts in the case, nor has the incident been observed in a very extended examination of the printed volumes containing the history of the Federal and Confederate navies. However, Sir Walter quotes to me a letter from Sir William, written just before the latter's death in December last: "The United States authorities did imprison men taken in blockade-running. Our vessel (*Diamond*) was taken to Washing-

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<sup>1</sup> *Yale Law Journal*, April, 1903.

<sup>2</sup> *The Daily Chronicle*, London, December 29, 1903.

ton. We were turned over from the naval to the military authorities there \* \* \* march to provost marshal's quarters. Answered our names there, then our commitments to the old Capitol Prison were made out." There they were "quartered with prisoners and had hard usage." Eventually he was paroled out and given a written "parole" describing him as a prisoner of state, which parole he retained through life.

It must be freely admitted that owing to unfamiliarity with international law and to the suspension, as a war measure, of the writ of *habeas corpus*, so that our courts could not intervene, numbers of cases like the above seem to have occurred. That the situation was complicated by the fact that it was a matter of constant controversy, first, as to the neutrality of the ships, often claimed to be Confederate ships and only colorably sailing under a neutral flag; secondly, as to the nationality of the members of the crew, who were largely British, speaking the same language with the people of the United States, and who had often, like Sir William, lived for years in the United States. The rule excepting from imprisonment applies only to neutrals upon a neutral ship, and not to belligerents, or subjects, or to those operating a vessel of the belligerent government.

So the commandant of the Philadelphia Navy Yard wrote Acting Rear-Admiral Lee March 31, 1863: "I have disposed of the crews of the captured vessels—foreigners sent on shore, and citizens of the United States confined."<sup>1</sup>

March 24 in the same year, Captain Boggs of the *Sacramento*, one of the blockading ships off Wilmington, wrote to the rear-admiral in command, asking instructions as to the disposition of persons "taken out of vessels seized as a prize for violating the blockade. To send them north in the vessel would require a much larger prize crew than the

<sup>1</sup> *Official Rec. U. S. and Confed. Navies*, series I, vol. III, p. 643.

exigency of the fleet will permit. They are generally a daring set of men, and the compensation to them would be the strongest inducement to attempt a recapture."<sup>1</sup> The rear-admiral instructed him in reply to send those known, or for good cause suspected, to be citizens of the United States, north to the commandant of the navy yard to which the vessel conveying them might be bound. "Those against whom no such proof or suspicion is entertained, if they are not needed as witnesses in the adjudication, will be released from the blockading vessel as soon as practicable."<sup>2</sup>

Certain of the crew of the captured British blockade-runner *Adeline* were released on signing an engagement not to be again employed in like proceedings. Secretary Welles instructed the flag officer of the blockading squadron that the Secretary of State held this not warranted by public law and that the crew could not be held as prisoners of war and that they were absolved from the obligation.<sup>3</sup>

On July 25, 1863, President Lincoln instructed the Secretary of the Navy as follows:

"You will not in any case detain the crew of a captured neutral vessel or any other subject of a neutral power on board such vessel, as prisoners of war or otherwise, except the small number necessary as witnesses in the prize court.

"NOTE.—The practice here forbidden is also charged to exist, which, if true, is disapproved and must cease. [The President adds:] what I propose is in strict accordance with international law, while if it do no other good, it will contribute to sustain a considerable portion of the present British Ministry in their places, who, if displaced, are sure to be replaced by others more unfavorable to us.

"Your obedient servant,

"ABRAHAM LINCOLN."

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<sup>1</sup> *Official Rec. U. S. and Confed. Navies*, series I, vol. VIII, p. 625.

<sup>2</sup> *Ibid.* vol. VIII, p. 804.

<sup>3</sup> *Ibid.* vol. XII, p. 462.

The right as a reasonable precaution to place the captured crew in irons lest they rise and overpower the prize crew was maintained in an elaborate letter of Secretary Seward to Lord Lyons in 1861.<sup>1</sup>

The crew of the *Emily St. Pierre*, taken off Charleston, did retake the ship, gagging and putting in irons the prize officers and crew.<sup>2</sup>

In January, 1864, the Department of State sent to the Secretary of the Navy intercepted correspondence showing that vessels operated by the Confederacy in blockade-running were under orders to conceal their nationality, and suggesting that it would be proper to direct that henceforth British blockade-runners be detained in custody and not released as heretofore. Secretary Welles ordered accordingly and countermanded inconsistent orders,<sup>3</sup> but this was in turn revoked by the Secretary of the Navy May 16, 1864, and full instructions issued in accord with the views of President Lincoln, before expressed,<sup>4</sup> exempting *bona fide* neutrals on neutral ships from treatment as prisoners of war, and holding them "entitled to immediate release."<sup>5</sup>

The modern doctrine that neutral blockade-runners on a neutral ship are not subject to bodily punishment is not contravened, it is submitted, by the ultimate practice of the United States in its blockade of the Confederate coast, by all odds the greatest blockade known to history. It is believed that it is sustained by the text-writers generally.<sup>6</sup>

In the second great blockade of the past eighty or ninety years, that of the Cuban coast, the *Instructions of Blockading Vessels and Cruisers*, issued by the Secretary of the

<sup>1</sup> *Ibid.*, vol. XII, p. 407 *et seq.*

<sup>2</sup> *Ibid.*, vol. XII, p. 814.

<sup>3</sup> *Official Rec. U. S. and Confed. Navies*, series I, vol. IX, p. 285.

<sup>4</sup> *Ibid.*, vol. IX, p. 405.

<sup>5</sup> *Ibid.*, vol. X, pp. 60, 61.

<sup>6</sup> Gaulaudet on *Inter. L.* (condensed from Calvo), p. 298; T. J. Lawrence, *Prin. Inter. L.*, p. 592; Walker's *Inter. L.*, p. 525; Woolsey, *Inter. L.* (1899), p. 351; Hall's *Inter. L.* (1904), p. 710; 3 Phillimore's *Inter. L.*, p. 506 *et seq.*

Navy of the United States in 1898, and prepared by the State Department, expressly declare: "9. The crews of blockade-runners are not enemies and should be treated not as prisoners of war, but with every consideration."

The whole subject is most admirably reviewed by Calvo. The older practice is shown and that of the United States in the war with the Confederacy, and at the close he justly observes: "The usage concerning the non-infliction of bodily punishment on persons guilty of violation of blockade has become uniform enough so that we can consider confiscation of the property captured as now the sole punishment."<sup>1</sup>

The consul-general of the United States at Yokohama, by letter of July 27, 1904, kindly advises me that in the present Russo-Japanese war the Japanese have treated neutrals captured in attempting to run the blockade at Port Arthur in the same way, holding them as witnesses, it might be, but not as prisoners of war. That is, however, not strictly a blockade. The legation of Japan at Washington, under date of August 13, 1904, advises me of like practice by Japan as to officers and crews of neutral ships recently captured while carrying contraband, which is comparable to breach of blockade, and such persons have been treated in the same way by Russia.

The rule as quoted from Calvo, that great and authoritative writer on public law, seems, it is submitted, to meet with continued and universal acquiescence.

### *Contraband of War*

On the 14th of February, 1904, Russia, by proclamation, announced that in the war with Japan she would treat as contraband combustibles of all kind, such as coal, naphtha, alcohol, and other like materials. Also all materials for the

<sup>1</sup> Calvo, *Le Droit International*, Tome v. sec. 2899.



installation of telegraphs, of telephones, or railroads. This proclamation, together with an explanatory instruction of March 6, also declares contraband anything capable of serving as food or forage for the Japanese army, and especially rice and fish and its different products, beans and their oil.<sup>1</sup> By ordinance of April 26, cotton was added to the list. Under these declarations and ordinances, Russian war-ships have seized neutral vessels bound for Japanese ports and claimed as prize of war articles of the character listed. For instance, they have seized and caused to be condemned a cargo of American flour on a neutral ship not consigned to the Japanese Government or in any way ear-marked for belligerent use except by its destination to a port of Japan.

The doctrine that articles which may serve alike the uses of peace or war are not contraband unless intended for the military uses of a belligerent rests on two broad principles:

*First.* That neutrals under modern usage cannot be hindered in their general right to trade in innocent articles of commerce with belligerents except by an actual blockade, never by a proclamation.

*Secondly.* International law forbids a belligerent to make war upon the civil or noncombatant population of its opponent, and, as Hall says: "Hence seizures of articles of commerce becomes illegitimate so soon as it ceases to aim at enfeebling the naval and military resources of the country and puts immediate pressure upon the civil population."<sup>2</sup>

The claim of Russia has been at once controverted. The Department of State of the United States, in a communication to the ambassadors of the United States of June 10, took the ground that articles of double use (*ancipitis usus*) are contraband if they are destined for the military uses of a belligerent. It points out that the principle of the

<sup>1</sup> *Revue Générale de Droit International Public*, Mai et Juin, Documents, p. 12 et seq.

<sup>2</sup> Hall's *International Law*, (5th ed. 1904), p. 656.

Russian declaration "might ultimately lead to a total inhibition of the sale by neutrals to the people of belligerent states of all articles which could be finally converted to military use," and adds that such principles "would not appear to be in accord with the reasonable and lawful rights of a neutral commerce." Queen Elizabeth would not allow the Poles and Danes to furnish Spain with provisions, alleging that by the rules of war "it is lawful to reduce an army by famine."<sup>1</sup> But the present government of England has expressed its accord with the views of Secretary Hay by an official note of protest, dated August 1, against the claim that food is absolutely contraband.<sup>2</sup> Lord Lansdowne, in the Lords, August 11, said that the Russian declaration "greatly amplified the definition of contraband, including much England regarded as innocent. England would not consider herself bound to recognize as valid the position of any prize court which violated the recognized international law." And Mr. Balfour in the Commons, on the same day, said as to the doctrine that a belligerent could draw up a list of articles it would regard as contraband and that prize courts must decide accordingly: "If that doctrine were accepted without reservation, neutrals would be at a serious disadvantage." August 25, in reply to the shipping deputation, Mr. Balfour said there was no possibility of Great Britain receding, inasmuch as she knew she stood "on the basis of all recognized international law to be found in all the text-books and in accordance with the general practice of civilized nations."

The English view, and it is believed it is the view of the world, is well put by the *Law Times* of London.<sup>3</sup> It declares "the position of Russia as to contraband cannot be

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<sup>1</sup> Taylor's *International Law*, p. 736; Grotius, *Droit des Gens*, III, secs. 112, 117, and note to sec. 112.

<sup>2</sup> *Boston Evening Transcript*, August 9, 1904.

<sup>3</sup> *Law Times*, August 13, 1904, p. 330.

accepted for a moment by Great Britain," and says the point is well summed up by the London *Times* in a leading article: "To entitle a belligerent to treat goods as contraband, there must be a fair presumption that they are intended for warlike use, and such presumption does not arise from the mere fact that they are consigned to a belligerent port. In other words, non-blockaded ports should be open to the legitimate trade of neutrals, and belligerents who... have not the power to establish an effective blockade cannot be suffered to attain the object of such blockade by an... extension of the definition of contraband."

At least, since the Declaration of Paris of 1856, a paper blockade is of no legal force, and a blockade to be recognized by the law of nations must be "maintained by a force sufficient really to prevent access to the coast of the enemy."<sup>1</sup> This immensely increased the security of neutral commerce and ought not, by the device of declaring an extension of the list of contraband articles, to be done away at any time by any belligerent. The Russian declaration, which seeks to treat as contraband substantially all fuel and food and the staple from which clothing is made, would certainly have this effect if enforced, and the most objectionable harrying of neutral commerce and deprivation of noncombatant belligerents would be liable to follow. That this is no small matter to neutral trade is shown by a very simple consideration of the facts. If we regard the excessive number of two or even three millions of persons as engaged in or by location or otherwise infected by the warlike operations of Japan,<sup>2</sup> then neutral ships cannot carry supplies of food or fuel or clothing to those three

<sup>1</sup> Wheaton's *Inter. L.*, 4th Eng. ed., 1904, p. 691. See this also declared in Russian Declaration of February 14, 1904, "*Le blocus, pour être obligatoire doit être effectif.*"

<sup>2</sup> The entire number of persons in the army and navy of Japan, including reserve and landwehr, as appears by the *Statesman's Year-Book* of 1904, p. 864, was 667,362.

millions without liability to seizure, but they may still carry such supplies with entire immunity to some forty-two millions of Japanese, constituting the civil population. The extension by the terms of the Russian proclamation is of a limitation, lawful as to one fifteenth of the people, to the whole people, and it seems an unwarranted invasion of the plain rights of neutrals to trade in these great staples with forty-two millions of people.

It is certainly customary for belligerents to announce what articles they will treat as contraband, and the Institute of International Law resolved in 1877 that belligerent governments should determine this in advance on the occasion of each war,<sup>1</sup> and Prince Bismarck so stated in reply to a complaint of Hamburg merchants; but no substantial alteration of the rules of international law can be so made.

If a belligerent, commanding the sea, can thus paralyze the neutral transport of food, fuel, and the staples of clothing, the suffering and death inflicted on the millions of noncombatants in such island nations as Great Britain or Japan are appalling and quite unwarranted by public law, and the blow to neutral commerce is utterly destructive.

Considering the greatly improved facilities for inland transit, the test of noxious or not according to the character of the port of consignment may require modification, but such articles are, by the great weight of authority and practice, not, as Russia would make them, absolutely contraband, but conditionally so, if intended for warlike use.

So late as December, 1884, Russia, at the Congo Conference, declared that she would not regard coal as contraband,<sup>2</sup> and foodstuffs were not in her list of contraband in 1900.<sup>3</sup>

His Excellency, Count Cassini, the ambassador of the

<sup>1</sup> Hall's *International Law*, 5th ed. 1894, p. 653; *Annuaire* for 1878, p. 112.

<sup>2</sup> Lawrence's *War and Neutrality in the Far East*, p. 158.

<sup>3</sup> *Ibid.* p. 166.

Czar at Washington, on the 15th of September, kindly called my attention to the fact that: "As to the question of one of the belligerents declaring absolute contraband goods, not generally recognized as such, it cannot be regarded as something quite unusual. During the Franco-Chinese war, for instance, the French Government declared rice absolutely contraband without consideration to its use, which declaration was left unprotected by any neutral power."

With deference it is submitted that the action of France was in that case promptly protested by England and that Lord Granville gave notice that Great Britain would not consider herself bound by a decision of any prize court in support of the claim of France, and no seizure of rice was in fact made.<sup>1</sup>

Supplies of American canned meats bound for Port Arthur and Vladivostock were, at the opening of the war, seized by the Japanese, but they were plainly contraband as destined for the use of the enemy's armed force.<sup>2</sup>

As Dr. Lawrence shows, England imports about four fifths of the wheat and flour she consumes, and, as he says, "The value of our food trade to other nations secures that we shall receive powerful assistance in our efforts to keep it open. It is a matter of life and death for us to prevent any change in international law which shall make the food of the civilian population undoubtedly contraband, and if arguments and protests will not do it, force must."<sup>2</sup>

The United States is a great exporter of cotton (she produces about two-thirds of the world's supply) and of food products. About one-half of her population is directly engaged in agriculture, or constitutes the households of

<sup>1</sup> Hall's *International Law*, 1904, pp. 662, 663; Lawrence's *War and Neutrality in the Far East*, p. 164; Wheaton's *International Law*, 4th Eng. ed. 1904, p. 672.

<sup>2</sup> Lawrence's *War and Neutrality in the Far East*, p. 167.

those who are so engaged. As a result, no government can maintain itself in that republic which does not use all possible efforts to keep open this foreign trade in field products.

Against earnest and concurrent action on the part of these two powers it would seem strange if Russia should successfully carry out her plan for extending the definition of contraband, and so turn back the happy progress of neutral right. In so far as condemnations have already taken place, they will undoubtedly be the source of claims for damages which will not be easily satisfied.

The fact that cotton was declared contraband by the United States in its war with the Confederacy seems hardly in point, as cotton was then substantially a government monopoly in the Confederacy and almost its only source of revenue.<sup>1</sup> Cotton and its seed are the most considerable item in the imports of Japan, being almost twice as great again in value as sugar, the second article in value in the list.

The whole record as to claims and rulings as to contraband is singularly confused and conflicting, but the claim advanced by Secretary Hay seems so clearly within the practice and the weight of authority of the past half-century that it is hoped it may prevail. Neutral rights are the rights of the vast majority, and they should not be lightly prejudiced for those of the belligerents, who are always a small minority. The disturbance to trade, moreover, caused by a state of belligerency between any two maritime nations is now world-wide. Steam and electricity have made us all near neighbors, and exactly as the peace and order of a closely-settled urban community must be kept by far more stringent regulations than that of a community of scattered shepherds and farmers, just so the peace and

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<sup>1</sup> *Ibid.* p. 171.

security of the vastly increased and greatly more connected and interwoven commerce of the modern seas must be preserved by correspondingly adequate rules.

The St. Petersburg dispatches of September 12 seem to intimate that Russia, upon the advice of the commission of eminent persons appointed by her to consider this matter, is inclined to modify her declaration as to absolute and conditional contraband in substantial accord with the American and British notes, except as to cotton, and this is confirmed by those of the 19th. The action is received with very wide satisfaction, and, it is believed, is in accord with the peaceful and beneficent sentiment of the world. Russia is to be congratulated upon the wisdom and humanity of this action, and Secretary Hay upon his successful protest against what he well characterized as "a declaration of war against commerce of every description between the people of a neutral and those of a belligerent state."

### *Belligerent Act in a Neutral Harbor<sup>1</sup>*

The seizure of a Russian vessel of war by the Japanese in the Chinese harbor of Chefoo on August 12 involves most grave questions of international law. The Russian vessel was pursued by Japanese destroyers, but escaped from them in the night. They later found her in the neutral harbor. The Japanese vessels waited outside the port. The Russian failed to come out. The Japanese commander, anticipating his escape by night and a possible attack on merchantmen, entered the port with two destroyers. It is claimed the Russian had been in port twenty-seven hours, and was not yet completely disarmed. A Japanese officer with an armed force was sent on board in the night—the hour was 3 A. M.—with a message that the Japanese ex-

<sup>1</sup> A reply to this discussion was printed by Mr. K. K. Kawakami, attached to the Imperial Japanese Commission at St. Louis, in the *Japanese-American Commercial Weekly*, of September 24, 1904.

pected her to leave by dawn or to surrender. The Russian commander refused and was overheard directing that the ship be blown up. At the same time he seized the Japanese officer and threw him overboard, falling with him, and the Japanese interpreter was thrown overboard. The forward magazine exploded, killing and injuring several. The Japanese being armed, and the Russians disarmed, the former prevailed in the *mêlée* and took possession of the vessel and removed her from the harbor. The Japanese loss, due to the explosion, was one killed, four mortally wounded, and nine others injured. Admiral Alexieff informed the Czar that the vessel was disarmed the day before, according to arrangements with the Chinese officials. The captain and most of her officers and crew swam ashore and reported that the Japanese fired on them as they fled. The Russian captain reports that he had disarmed the ship, and having no arms to resist what he calls a piratical attack in a neutral harbor, ordered the ship blown up.

Admiral Alexieff says the Russians were conferring with the Chinese officials as to a temporary stay to repair the ship's engines, and had given up to the Chinese officials the breech-blocks of the guns and rifles and had lowered the ensign and pennant.<sup>1</sup>

Russia earnestly protested at Peking against this violation of a Chinese port. Japan retained the vessel and justified the seizure on several grounds, claiming that the Russian ship was not effectively disarmed; that her continuance in the harbor after the lapse of twenty-four hours was itself a violation of the neutrality of China and so absolved Japan; that the visit was to ascertain whether or not the ship was in fact disarmed adequately and whether she had just claim to remain for repairs, and to demand her departure otherwise, and that the Russians began hostilities

<sup>1</sup> See *London Times* (weekly ed.), August 19, 1904, p. 532.



and thus justified the Japanese in the capture; that the weakness of China in enforcing her neutrality and the nearness of the port to the seat of war all excused the transaction.

It is respectfully submitted that none of these can be accepted as justifying the capture without suffering serious impairment of the sanctity, the peace, and order of neutral harbors and encouraging a painful retrogression in the public law applicable.

As Wheaton says, Bynkershoek alone, of writers of authority, allows the seizure of a vessel pursued into neutral waters, and even he admits he has never seen this doctrine in any but the Dutch writers.<sup>1</sup> Mr. John Bassett Moore shows that Bynkershoek's doctrine as to right of pursuit is almost unanimously condemned collecting the authorities upon the subject,<sup>2</sup> and he also shows that in 1806 President Madison so held in protesting against the destruction of a French ship *L'Impétueux*, disabled by a gale and destroyed by the *Melampus* and two other British ships on the coast of North Carolina. The present was, moreover, hardly a case of fresh pursuit, the Russian vessel having eluded her pursuers and having been later found in the Chinese port.

The practice of powerful belligerents, and especially England, was formerly to pay little, if any, attention to the sanctity of a neutral port, yet the practice seems never to have been deemed lawful.

Here are some of the old precedents involving hostile meetings of war-vessels in neutral waters. During the second Punic war, Scipio, with two Roman galleys, entered the port of Syphax, king of Numidia, to seek his alliance. There he found Hasdrubal upon a like errand with seven

<sup>1</sup> Wheaton's *International Law*, sec. 429 (4th ed. Eng.).

<sup>2</sup> Moore's *International Arbitration*, p. 1120.

Carthaginian galleys, but they "durst not attack him in the king's haven."<sup>1</sup> The Venetians and Genoese being at war, their fleets met in the harbor of Tyre, "and would have engaged in the very haven, but were interdicted by the governor," and therefore went to sea and fought in the open.<sup>2</sup>

In 1604 James the First of England forbade acts of belligerency in certain waters near the English coast; but in 1605 the Dutch and Spanish fleets fought in Dover Harbor. The English castle was silent until the victorious Dutch bound their prisoners two by two and threw them into the sea; then at last the castle battery fired upon the inhuman victors.<sup>3</sup> England here tardily resisted a breach of the neutrality of a British port. However, a year later, the Dutch East India fleet was attacked by the British in Bergen Harbor. The governor of the town fired upon the attacking fleet.<sup>4</sup>

Four French ships of war which fled to Lagos after conflict with the English off Cadiz, in 1759, were destroyed in that harbor by the English. Portugal made complaint to England. Pitt was civil and an apology was duly made by the Earl of Kinoul as special ambassador extraordinary, who promised that the British would be more careful in the future, but there was no restitution or compensation.<sup>5</sup>

Phillimore declares this "a clear and unquestionable violation of the neutral rights of Portugal, and it was one of the causes of war by France against Portugal."<sup>6</sup>

In 1781 an English squadron in Porto Praya, in the Cape Verde Islands, was attacked by a French fleet. The Portuguese fort resisted the attack and no prizes were

<sup>1</sup> Moore's *International Arbitration*, p. 1116, quoting the incident from Livy.

<sup>2</sup> Moore's *International Arbitration*, p. 1117, quoting Molloy, *De Jure Maritimo* (5th ed.), p. 12.

<sup>3</sup> Walker's *International Law*, pp. 169, 170; Grotius' *Hist.* vol. xiv, p. 794.

<sup>4</sup> Vattel, bk. III, chap. VII, sec. 132.

<sup>5</sup> Dana's *Notes to Wheaton*, sec. 430; Moore's *International Arbitration*, p. 1127.

<sup>6</sup> Phillimore's *International Law*, sec. 373.

taken. The French Government approved the attack, as Ortolan says, perhaps in retaliation for the action at Lagos.<sup>1</sup>

The French frigate *Modeste* was captured by the English in the harbor of Genoa in 1793. There was neither apology nor restitution.<sup>2</sup>

In the war of 1812 the United States frigate *Essex*, at anchor and dismasted in Valparaiso Harbor, was attacked and captured by two British ships. The *Levant*, a prize of the United States frigate *Constitution*, was chased into Porto Praya and there captured while at anchor by vessels from the British fleet.<sup>3</sup>

The American privateer *General Armstrong*, a brig of seven guns, was attacked and destroyed by a British squadron of one hundred and thirty guns in the harbor of Fayal in 1814.<sup>4</sup> The resistance was most gallant and assaults were repeatedly repulsed with great loss of life. The Portuguese governor interposed with the English commander to obtain a cessation of hostilities, but the latter claimed that the *Armstrong* had fired upon the English boats without cause and that he would take possession of the privateer in consequence, saying that if the Portuguese interfered he would treat the castle and island as enemies. It appeared that at evening the long-boats of the British squadron, with a large force, apparently armed, outnumbering the crew of the privateer, approached so as to touch her stern with a boat-hook. They were warned off, and not desisting, were fired on with fatal results, and returned the fire. The English commander claimed that he intended to reconnoiter the privateer merely, and to observe the neutrality of the port. The circumstances were such that

<sup>1</sup> Moore's *History of International Arbitration*, p. 1127; *Diplomatie de la Mer*, II, 320.

<sup>2</sup> Hall's *International Law* (ed. of 1904), p. 602.

<sup>3</sup> Dana's *Notes to Wheaton*, sec. 430.

<sup>4</sup> Wharton's *Digest*, 604; Snow's *Cases in International Law*, p. 396.

the Americans thought themselves justified in taking the approach as an attack and attempted boarding, and in resisting accordingly. The vessel lay during most of the affray within a half-pistol-shot of the castle. Some buildings were burned and persons were killed upon the land by the British cannonade, well illustrating the results of such a practice.

This was the foundation of a claim against Portugal by the United States for failing to keep the peace of the port. On a reference to Louis Napoleon, President of the French Republic, as arbiter, he finally held, in 1852, a few days before he assumed the imperial dignity, against the claim, on the ground that the Americans did not apply for protection to the Portuguese authorities in time, and that they fired first upon the British boats as they approached in the night. This case has been cited as the principal case supporting the conduct of the Japanese at Chefoo.

Dana says that the "decision was not satisfactory to the United States Government, as they did not consider the fact on which it rested as established in proof." He thinks the rule should be confined to cases where the vessel "makes a fair choice to take the chances of a combat rather than to appeal to neutral protection."<sup>1</sup>

Lawrence thinks the doctrine of the decision has been fully accepted by British publicists, while American jurists have been disposed to deny or qualify it, but he reaches the conclusion that the side which in a neutral harbor fights purely in self-defense can hardly on that account forfeit the right to redress.<sup>2</sup>

The rule that the belligerent captured in a neutral port cannot recover compensation from the neutral power unless he demanded protection and there was failure to afford it,

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<sup>1</sup> Dana's *Notes to Wheaton*, sec. 430.

<sup>2</sup> T. J. Lawrence's *International Law*, p. 540.

is by no means an indication that the neutral may not demand satisfaction for the invasion of its sovereignty without any such circumstances. The basis of recovery is the negligence of the neutral in one case, but the basis of recovery in the other is the trespass of the offending belligerent.

Mr. Justice Story, a person quite as extensively versed in public law as Napoleon the Third, considered that a belligerent attacked in neutral territory is justified in using force in self-defense.<sup>1</sup>

It is impossible that international law should be so divorced from the law of nature and all municipal law as to hold otherwise, and in the private law of self-defense one may always justify upon the appearance of necessity.

It is believed that later practice and decisions in no way warrant the invasion of a neutral port even to seize or attack a hostile cruiser harboring there. Ortolan long since, while strongly supporting the extritoriality of ships of war, yet declared that if the vessel of war in territorial waters undertakes to commit any acts of aggression or hostility or violence, it is the right of all nations immediately to take all the measures and employ all the means necessary for a legitimate defense.<sup>2</sup> It is literally defense against a hostile invasion.

The more recent precedents are as follows: Near the opening of the Franco-Prussian war, a French ship, after an unsuccessful combat with a German ship off the harbor of Havana, escaped into the harbor. The German vessel respected the neutrality of the Spanish port and did not further molest the French ship, which remained at Havana until the close of the war.<sup>3</sup>

<sup>1</sup>Hall's *International Law* (ed. of 1904), p. 625, and note citing *The Anne*, 3 Wheaton, 477. See also T. J. Lawrence, *International Law*, p. 540.

<sup>2</sup>*Diplomatie de la Mer*, ix, 218.

<sup>3</sup>*Harper's Weekly*, August 27, 1904, p. 1309.

The United States warship *Wachusett* in 1864 attacked and captured the Confederate cruiser *Florida* in the harbor of Bahia and towed her to sea. In that case, also, there was resistance and shots were exchanged and three men were injured on the attacking vessel.<sup>1</sup> She was pursued by a Brazilian man-of-war, but escaped by superior speed. Although feeling against vessels of the class of the *Florida* and against countries harboring them was most intense, yet the act was repudiated wholly by the United States, the commander of the Federal vessel was court-martialed, the consul who had advised him dismissed, and the Supreme Court held that Brazil was justified by the law of nations in demanding the return of the captured vessel and proper redress otherwise, and that the captors acquired no rights.<sup>2</sup>

In like manner, in the case of the American steamer *Chesapeake*, which was, it was claimed, piratically seized on a voyage between New York and Portland in 1863 by certain alleged Confederate partisans, who took passage on her in New York, she having been pursued by a warship of the United States into Nova Scotian waters and there seized, and two men on board and one of the leaders of the partisans on a neighboring vessel taken into custody; the vessel and the men were surrendered by the United States and an apology made for violating British territory.<sup>3</sup>

Dispatches from Buenos Ayres of August 28, 1904, show that relations between Argentina and Uruguay have become strained through an attack by Uruguay on an insurrectionary force directed against her, but in Argentine waters.

The cases holding the seizures of merchant vessels in neutral waters void are too numerous to collate and are therefore omitted.

<sup>1</sup> Maclay's *History of the Navy*, vol. II, p. 557.

<sup>2</sup> *The Florida*, 101 U. S. 37; Hall's *International Law* (ed. 1904), p. 620.

<sup>3</sup> Hall's *International Law* (ed. 1904), p. 620; Wheaton's *International Law* (4th ed. Eng.), p. 580.

The fact that the Russian ship had remained more than twenty-four hours in the Chinese harbor shows a possible violation of the twenty-four-hour limit adopted by China in her declaration of neutrality, if the Russian ship was not, as claimed, detained for necessary repairs and already disarmed.

The limit of twenty-four hours was one which China could adopt or not in her discretion and therefore could enforce or not.<sup>1</sup> No other power had the right to enter her ports to enforce it. It is usual, but not a legal obligation, for neutral nations to fix such a limit for the stay of belligerent ships of war in their ports. Though such a rule seems in process of formation as a requirement, yet during the present operations, though many have, numerous nations appear not to have announced such a limit.

In the case of a Russian gunboat in the harbor of Shanghai which failed to withdraw on the demand of China, Dr. Lawrence says that Japan "might have given notice to China that she would no longer respect the territorial waters of a state which seemed powerless to defend its neutrality, or she might have claimed reparation for the indulgence shown to her opponent."<sup>2</sup> She did neither, but after long parley the Russian vessel was dismantled. The statement of the rights of Japan seems extreme, and the constant assumption that the twenty-four-hour limit is a provision of international law which a belligerent may enforce against any neutral seems wholly unwarranted.

A practice of declaring such limit is widespread and growing, but the rule on this subject, as stated in the edition of Wheaton published within the year with notes by J. Beresford Atley, is as follows: "The reception or exclusion of belligerent cruisers and their prizes in neutral ports

<sup>1</sup> Dana's *Notes to Wheaton*, sec. 429.

<sup>2</sup> *War and Neutrality in the Far East*, p. 138.

is a matter entirely at the discretion of the neutral government.”<sup>1</sup> He shows that the limit of twenty-four hours for the stay of a belligerent ship of war in a neutral harbor is not half a century old and depends on the action of the neutral power in declaring it, and that it is not a settled obligation of international law.

Lawrence thinks the twenty-four-hour regulation admirable, and points out that neutrals are bound to treat both belligerents alike, but says the law of nations allows the stay of belligerent vessels in neutral ports, and that we have no right to complain where this regulation is not adopted. He says expressly that the common “assumption that international law forbids belligerent vessels to enjoy the shelter of neutral ports for more than twenty-four hours at a time...is an error, but one so general that those who give expression to it have much excuse.”<sup>2</sup>

A neutral state may at will close all its ports to belligerents, and the *New York Nation* says: “Norway and Sweden, we believe, have done so in the present war.”<sup>3</sup> It is believed that Norway and Sweden and Denmark have excluded warships of the two belligerents from a large number of their principal fortified ports, but not from all. Their proclamations of neutrality seem so to provide, and this has been their policy for half a century.<sup>4</sup> They impose the twenty-four-hour limit in such ports as are left open.

The fact that Japan on September 11 made protest against the Russian auxiliary cruiser *Lena* remaining in San Francisco Harbor longer than twenty-four hours brings home the question to the United States Government. The vessel claimed that she was detained for neces-

<sup>1</sup> Wheaton's *International Law* (4th Eng. ed.), p. 587, note.

<sup>2</sup> *War and Neutrality in the Far East*, p. 120.

<sup>3</sup> *The Nation*, August 4, 1904, p. 101.

<sup>4</sup> *Revue Générale de Droit*, Mai et Juin, 1904, pp. 14 and 15 of Documents.



sary repairs and the United States took steps to ascertain whether or not this was well founded, and enforced very fully its neutral regulations by directing the disarmament of the ship. It is inconceivable that any foreign power could undertake to investigate by force such a question and to determine for itself the facts and thereupon precipitate a naval engagement in San Francisco Harbor. It is not conceivable that such a practice could be tolerated by the neutral maritime powers. The claim of the Japanese consul of a right personally to inspect the *Leha* was not admitted by the collector of the port, who held, very justly, that such inspection was the business of the United States authorities alone.<sup>1</sup> A belligerent cannot have the right to police all neutral harbors for the purpose of enforcing regulations imposed by those powers. Any such invasion of territorial jurisdiction upon a disputed question of fact would be lamentable in its results, and any rule naturally leading to such consequences should be resisted absolutely on its first appearance.

The *Nation* asks in this connection why all neutral ports should not be closed except to ships in distress. It may be observed that a neutral state does habitually close its landed territory to the forces of a belligerent, and that a like rule applied habitually to neutral ports would greatly limit naval warfare and tend to check the loss and disturbance which it inflicts on neutral commerce. It would strongly tend to localize war and avoid far-reaching complications. The main objection to it, as has been said, is the overwhelming advantage it would give to great colonial powers like Great Britain, having ports in all parts of the world.

Peace being the normal order of things, as Sir John Macdonell has lately said, the disposition of the past forty years has been that the "interest of neutrals should prevail in

<sup>1</sup> New York *Nation*, September 15, 1904.

conflict with those of belligerents,"<sup>1</sup> and the recrudescence of belligerent sentiment which Sir John reports must be abated. Commerce, after all, is the great interest and service of the seas, and war is a minor and temporary affair. The greater interest ought not to yield to the less, except under the most direct necessity.

### *Sinking Neutral Vessels*

The sinking of a neutral ship by a Russian squadron on the ground that she was carrying contraband of war and that it was impossible on account of the weather, lack of coal, and the neighborhood of a Japanese fleet, to bring her in for adjudication has led to wide and unfavorable criticism.

The ship, the *Knight Commander*, was alleged to be loaded with a cargo of railroad supplies intended for belligerent use by Japan. Her papers were preserved, her officers and crew placed in safety and allowed to attend the condemnation proceedings at Vladivostock. The court there subsequently held such proceedings a basis for condemnation.

The criticism seems to rest on the doctrine often asserted that although a belligerent vessel taken as a prize may be destroyed if it cannot be brought in, yet a neutral vessel so taken must not be destroyed, but if she cannot be brought in, must be allowed to go free, even though carrying contraband.

The contraband articles cannot be taken from the neutral ship for at least two reasons: First, commonly, as in the case of the *Knight Commander's* cargo of railroad supplies, it is physically impossible for the warships to accommodate them. Secondly, the claim always is that the ship and her papers and necessary witnesses must be brought into

<sup>1</sup> *Nineteenth Century*, July, 1904.

port as a condition for condemning the cargo. Thus, in the *Trent* affair, where it was claimed that the carrying of Messrs. Mason and Slidell was in the nature of carrying contraband, and that therefore their seizure and removal was warranted, it was successfully answered that until condemned by a proper prize court, a captor has no right to do anything except bring the ship before the court.<sup>1</sup>

This doctrine, that a neutral vessel can never be destroyed before adjudication, seems to rest mainly on the case of the *Felicity*,<sup>2</sup> where Sir W. Scott passed on the subject of an American merchant ship and cargo destroyed by the English cruiser *Endymion* during the war of 1812. The vessel was sailing under British license but mistook her captor for an American warship. She therefore concealed this license. The weather was so boisterous and the vessel so injured that she could not be brought to port, nor could the captor spare a prize crew. She was therefore burned. The court holds, as her license was concealed, she must be treated simply as a belligerent, and that the destruction was legal. It is said, *arguendo* merely, that if she had shown her license she would have been entitled to be treated as a neutral, and Sir William says:

"Where it is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified, under any such circumstances, by a full restitution in value. These are rules so clear in principle and established in practice that they require neither reason nor precedent to illustrate or support them."

This remark of an eminent judge seems largely the parent of the rule. It is submitted, with deference, that the rule

<sup>1</sup> Wheaton's *International Law* (ed. 1904), sec. 109 b.

<sup>2</sup> Dodson's *Admiralty*, 381.

apparently sought to be enforced by the Russian authorities and recognized by the Vladivostock court, is more just and reasonable, namely, that if, for good and sufficient cause, such neutral prize cannot be brought in, there is no obligation to allow her to go free, to reinforce the enemy with her cargo, but as a rule of necessity, to prevent the delivery of the cargo, she may be destroyed exactly as a belligerent, the crew and papers being preserved, and the question of prize or no prize being adjudicated as if she had been brought in. It seems too much to expect the other rule to be observed where the cargo is plainly contraband and important to the enemy. The objection by England to the destruction of this ship, *M. de la Peyre* declared recently, does not rest on a solid foundation, and that of the United States, he says, is even less permissible, since during the War of Secession the two parties systematically sank all the prizes.

*M. de la Peyre* is under a mistake. The Federal cruisers habitually brought in and submitted to the prize courts their captures. No such course was open to the Confederate cruisers, since all the ports of the Confederacy were blockaded and the ports of no other country were open to them for such use.

Captain Semmes, of the Confederate cruiser *Alabama* habitually burned his captures,<sup>1</sup> but he seized only vessels belonging to American citizens and carefully avoided neutral ships or cargoes. His practice is therefore precedent as to the right to destroy a neutral vessel without condemnation.

His situation was, however, such that if he had the full rights of a belligerent it would seem that he had as a matter of necessity the right to destroy contraband of war even

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<sup>1</sup> *Records United States and Confederate Navies*, vol. I, where conduct of both navies is set out at length and in detail, with records and correspondence.

without the intervention of a prize court. Suppose an armed British ship, fitted for belligerent use, had been met on her way to a Federal port, evidently designed for sale and likely to be bought by the Federal Government. Would Captain Semmes have been bound by international law to leave her unmolested since he could not bring her into port for condemnation? The suggestion that such is the law of Sir William Scott's *dictum* and the echo of it by the writers, cannot be concurred in.

It must be admitted that a neutral, carrying contraband, is not exposed by that act alone to condemnation of the ship, but Sir William Scott himself recognized that "the ancient practice was otherwise," and said: "It cannot be denied that it was perfectly defensible on every principle of justice."<sup>1</sup> He shows that modern policy has introduced a relaxation on this point, but that circumstances of aggravation or misconduct may revive against the ship the ancient penalty.

Justice Story shows that the penalty is applied to the vessel on account of coöperation "in a meditated fraud upon the belligerents by covering up the voyage under false papers and with a false destination."<sup>2</sup> The whole right of seizure and condemnation of neutral contraband is based, as Kent shows from Vattel, on "the law of necessity" and "the principle of self-defense."<sup>3</sup>

Sir W. Scott held that the penalty for carrying dispatches of a belligerent (certainly a more noxious act), must be the condemnation of the neutral ship, and argues that the confiscation of the dispatches would be ridiculous and says: "It becomes absolutely *necessary*, as well as just, to resort to some other measure of confiscation, which can be no

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<sup>1</sup> *The Neutralitet*, 3 C. Robinson, 295.

<sup>2</sup> *Carrington v. Merchants Ins. Co.*, 8 Peters, 495.

<sup>3</sup> *Seton v. Low*, 1 Johns, Cases, 1.

other than that of the vehicle.”<sup>1</sup> If the courts of Russia, reasoning as boldly as Sir William, Mr. Justice Story, and Chancellor Kent, are allowed to maintain their conclusion from the rules of justice and necessity, their position is by no means untenable.

His Excellency, Count Cassini, the Russian imperial ambassador to the United States, on the 15th of September, 1904, by letter, kindly called the writer’s attention to the Russian imperial order of March 27, 1895, which reads as follows:

“In extreme cases, where the retention of ships is impossible, owing to their bad condition, when they are of small value, in danger of capture by the enemy, when at a great distance from a home port, or when there is danger for the ship which has taken the prize, the commander, upon his responsibility, may burn or sink the captured vessel after previously having taken her crew and as far as possible her cargo. Her documents must be preserved and witnesses can be held for the purpose of testimony before the prize court.”

His Excellency adds:

“As this last declaration has never been protested by any power, it appears, consequently, that the commander of the Russian man-of-war committed a perfectly lawful act in sinking the British steamer *Knight Commander*, which was undoubtedly carrying contraband of war, as was proven immediately after her being stopped. This was confirmed later on at the trial, when the deposition of the captain was refuted and contradicted by the presented board documents which he supposed to be lost with the ship.”

The instructions issued by the Secretary of the Navy of the United States in 1898 to blockading vessels and

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<sup>1</sup> The *Atlanta*, 6 C. Robinson, 440.

cruisers, and prepared by the Department of State, strongly resemble those of Russia.

They are as follows:

"28. If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold, and if this cannot be done, *they may be destroyed*. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But, in all such cases, all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered."

It is to be observed that the language is general, applicable to neutral as well as belligerent vessels, and it is believed it in a measure supports the Russian contention.

It is submitted that this rule and the Russian practice are entirely reasonable and in accordance with the necessities of maritime war and that they are, therefore, able to impair the authority of a *dictum* even from so eminent an admiralty judge as Sir W. Scott.

The result of this inadequate discussion of these several problems in international law (a few of the many lately mooted) is a humiliating sense of the uncertainty, confusion, and conflict which still attend the maritime rights of neutrals in the time of war. One is forced almost to acquiesce in M. de la Peyre's recent statement that maritime international law does not exist.<sup>1</sup>

It certainly shows the great necessity of an authoritative international conference to discuss, define, and establish the rights and duties of neutral commerce in time of war. Now that the vast and complicated machinery of war is of such desolating destruction, it is more true even than a generation ago, when the late Mr. Lecky so convincingly

<sup>1</sup> *Questions diplomatiques et coloniales*, August 1, 1904, p. 185.

proclaimed it, that the rich nations are the potent ones in war, as in a ruder age they were not. It is true, too, that the very riches which enable them to support, powerfully persuade them to avoid, war. These great commercial powers possess the seas with their beneficent adventures, and they must strive to keep the peace on those great highways of all the nations, and the ships that bear the means of life must be considered as of interest and human claim equal and paramount to those designed to inflict death.



# THE PRESENT PROBLEMS OF CONSTITUTIONAL LAW

BY JOHN WILLIAM BURGESS

[JOHN WILLIAM BURGESS, Professor of Political Science and Constitutional Law since 1876, and Dean of the Faculty of Political Science since 1890, Columbia University. b. Conersville, Giles County, Tenn., August 26, 1844; A.B. Amherst, 1867; Ph.D., LL.D.; Post-graduate of Universities of Göttingen, Leipzig, and Berlin. Professor of History and Political Economy, Knox College, Illinois, 1869-70; Professor of History and Political Science, Amherst College, 1873-76. Member of American Historical Association; American Economic Association. AUTHOR OF *Political Science and Constitutional Law*; *The Middle Period of American History*; *The Civil War and the Constitution*; *Reconstruction and the Constitution*. CO-EDITOR OF *Political Science Quarterly*.]

TEN years ago one was accustomed to hear the proposition confidently advanced and stoutly maintained that the period of development of constitutional law had closed, and that the civilized world was in the period of administrative development. I knew then that this proposition, if not an error, was at least an exaggeration, and everybody knows it now. If the devotees of administrative law and theory had been content to say that constitutional law had reached a much fuller development than administrative law, and that its unsolved problems, though highly important, were fewer in number than those of administrative law, no fault could have been found, or could now be found, with the contention. But the events of the last six years especially have shown most conclusively that the work of the constitution-makers is far from completion, and that we have entered, or are about to enter, upon a new period of constitutional development. Facing this situation, let us, in the short hour allowed to this paper, discuss a few of the more important problems which await solution or a new solution.

All questions of constitutional law, as of political science, may be classified under three grand divisions, viz., sovereignty, government, and liberty.

I will not enter upon a philosophical treatment of the term and concept "sovereignty." I will only say that in every constitution there should be a workable provision for its own amendment, and that in every perfect, or anything like perfect constitution, this provision should constitute organs for accomplishing this purpose which shall be separate and distinct from, and supreme over, the organs of the government, which shall truly represent the reason and the will of the political society and the political power upon which the constitution rests, and which shall operate according to methods and majorities which will always register the well-considered purpose of that society and that power. I hold the first problem of the constitutional law of the present to be the fashioning of the clause of amendment so as to correspond with these principles.

If we examine the constitutions of the great states of the world, and contemplate their history during the last twenty-five years, we shall see at once how pressing this necessity is.

Leaving out of account the British constitution as being, in the ordinary conception, an unwritten instrument, and the Austro-Hungarian *Ausgleich* as partaking more of the character of a treaty than of a constitution, we shall find that the constitutions of three of these states, viz., Spain, Italy, and Hungary, contain no provisions at all for their own amendment; that all the rest, including Great Britain and excepting France and Switzerland, use exclusively the organs of their governments for making constitutional changes; that France uses the *personnel* of her legislature, but under different organization, for this purpose; that Switzerland accords her legislature a power of initiating

such changes, which in practice frequently creates embarrassments to the prompt and certain action of the popular will; and finally that all except Great Britain, France, Switzerland, and perhaps Norway, require such majorities for action as to make these provisions generally practically unworkable, except in times of great excitement, the very moment, if any, when they should not work.

Let us take, for example, the provision of amendment in the constitution of the United States as being the one in which the majority of this audience is probably most interested, and as being the provision made by that great state which more than any other professes to develop through the methods of gradual and peaceable reform rather than through the European and South American methods of revolution and reaction. This constitution was framed originally, without any warrant of existing law, by a general convention of delegates selected by the legislatures of the different states of the Confederation, except the legislature of Rhode Island, and it was adopted originally, also without warrant of any existing law, by conventions of delegates chosen by the people within these several states. The general convention proposed, or more correctly ordered, and that, too, without any warrant of existing law, that the proposed constitution should go into operation when ratified by conventions of the people in nine of the thirteen states of the Confederation, and it actually went into operation when conventions of the people in only eleven of these states had ratified it.

I shall not enter upon any criticism or any scientific explanation of these procedures. I will only say that to my mind they were entirely extra-legal, and, therefore, revolutionary, but were necessary, necessary because of the absence of any workable method of amendment in the Articles of Confederation.

Warned by this experience, the framers of the new constitution wrote a method of amendment into this instrument which they expected could be and would be effectively exercised.

It *was* exercised, first, to limit the powers of the central government in behalf of the individual, to perfect the realm of individual immunity against the powers of the central government, which was in the line of true progress. It was applied, in the second place, in behalf of the exemption of the states from the jurisdiction of the United States courts, which was the first result in constitutional law of the reaction of 1793 against the national movement of 1787. And it was employed in the third place to cure some of the defects in the election of the president and vice-president. Then for more than sixty years, while the mightiest changes were being realized in the social, political, industrial, commercial, and educational conditions of the country, not one trace of any of them found its way into the constitutional law of the nation.

We may say that the main direction of the movement in the social, political, and economic elements down beneath the constitution was, whether consciously recognized or not, towards limiting the powers of the states of the Union in behalf of the powers of the central government and the liberty of the individual. The pressure of the movement was so strongly felt by so great a portion of the people of the country, and so strongly resisted by another great portion, that it led to the appeal to arms of 1861. The method of amendment, intended for every exigency, had proved itself unequal to the emergency, and when employed again in the last three constitutional changes, it simply registered the results of battle. In the main, what was then and thus accomplished was correct in substance, but the method which was necessitated showed again that nothing like the perfect

principle and form of constitutional amendment had been reached.

And now, again, for thirty-five years mighty changes have been wrought in the structure of our political and civil society, and in our commercial and industrial relations, and yet not one of them has been registered, by the process of amendment, in our constitutional law.

From this brief review it seems entirely manifest that the method of amendment provided in the constitution of the United States is ordinarily unworkable, and that the first problem of the constitutional law of the present in this country, as well as in almost all other countries, is the revision of the provision for constitutional amendment. Let us now scrutinize a little more closely the details of the provision in order to make its defects clear and definite. At the very first glance we discover that really four methods of amendment are legalized by the provision. The first method authorizes the initiation of an amendment by a constitutional convention of the United States, called by Congress on demand of the legislatures of two-thirds of the states of the Union, and ratification by conventions of the people in three-fourths of the state. The second method authorizes the initiation of an amendment in the same manner and by the same body as the first, and ratification by the legislatures of three-fourths of the states. The third method authorizes initiation of the amendment by a two-thirds vote in both houses of Congress and ratification by conventions of the people in three-fourths of the states. And the fourth method authorizes initiation of the amendment in the same manner and by the same body as the third, and ratification by the legislatures of three-fourths of the states. Only one of these methods, however, has been employed, viz., the last. Convenience has dictated this, and convenience is ordinarily stronger than principle in a country which moves so fast as ours does.

Now it is evident that what makes these methods of amendment almost practically unworkable is the extraordinary majorities required both in the initiating and in the ratifying bodies. The idea was, of course, to make constitutional change conservative, a laudable purpose indeed, but a dangerous thing when that conservatism is mechanical and artificial, and it always becomes such when it permanently prevents the will of the undoubted permanent majority of the whole people in a democratic republic from realizing its well-considered, well-determined purposes in its true conservatism, a way which does not contradict the fundamental principle of majority right, and that way should always be followed.

This matter of the majority is not, however, the sole element in the problem of a proper provision for constitutional amendment. There are several other points of great importance. One I have already adverted to, viz., the error in sound political science of using the *governmental* organs for the making of constitutional law. To illustrate this let us consider the process of constitutional amendment in the German imperial constitution. According to the provision of amendment in that instrument, constitutional law can be made by a simple majority vote in the Reichstag sustained by forty-five of the fifty-eight voices in the Bundesrath, while the two bodies by simple majority vote in each make ordinary law. Now it is the impulse of the Reichstag to call every measure which it desires to see passed ordinary law, and it is the impulse of the minority in the Bundesrath to call every measure which it desires to defeat constitutional law, and the constitution provides no organ for determining a hermeneutical contest over this point, unless the Emperor's power of promulgating the laws covers the question. Some of the commentators upon that instrument contend that it does. Some say that in the exercise of his

power of promulgating the laws, the Emperor may look into the content of any measure, and that, if in his opinion the measure is one of constitutional law and has not received the proper majority in the Bundesrath for making constitutional change, he may refuse promulgation. But the Reichstag does not accept this doctrine. Moreover, it is the practice in the Imperial legislature to allow the passage of a law by that body which is not authorized by any power at the time vested in that body by the constitution, provided it has received the necessary majority in the Bundesrath to make a constitutional change. Such a law is not inserted in the text of the constitution as an amendment to that instrument, but it is incorporated in the ordinary statutes, and the question arises at once as to how it may be repealed, whether by the method for making or repealing ordinary law or by that necessary for making constitutional changes.

Under such a practice, the whole question as to what is constitutional law and what is ordinary law becomes confused. From the point of view of written constitutions, constitutional law is the law provided *in* the constitution. From the point of view of unwritten constitutions, on the other hand, constitutional law is that part of the law which *ought* to be regarded as fundamental and organic. There is sufficient opportunity for difference of opinion in regard to the first kind of constitutional law, but in regard to the second there is no complete agreement on the part of any two minds. Of course, the two kinds of constitutional law ought to agree exactly. What, from a true philosophical point of view, is fundamental and organic ought to be *in* the constitution, and, *vice versa*, what is in the constitution *ought* to be regarded as fundamental and organic and nothing less. But in practice there is a wide difference as to result between the *interpretation* of a written instrument

and individual opinion, or popular opinion, or legislative opinion, or executive opinion, as to what part of the law *ought* to be regarded as fundamental and organic and what as ordinary. In the first there is some measure of certainty and continuity; in the second, on the other hand, there is very little. And when the two processes of determination are authorized in the same political system, they are bound to introduce inextricable confusion. The root of the difficulty is to be found in making the *governmental* organs the organs for constitutional amendment. The *personnel* of the government, especially of the legislature, may be used for making constitutional law. It would be inconvenient, and perhaps injurious, if it could not be. But it is not necessary that this should be effected through the *governmental organization*. That *personnel* may be specially organized for this purpose, as the French constitution provides, by uniting all the members of both legislative chambers in one national constitutional convention with constituent power. The *body* authorized to make constitutional law and constitutional law only being entirely distinct from the *body* authorized to make ordinary law and ordinary law only, even though composed of the same individual persons, there can be no possibility of confounding the two kinds of law in any system.

Finally, there is a grave problem of constitutional law involved in the exception, to be found in some of the constitutions, of certain subjects from the general power of amendment. This occurs usually in the constitutions of those states which have the federal form of government, as in the constitutions of the United States and of the German Empire, where the existing relations of representation of the States of these Unions in the upper chamber of the legislature is excepted from the ordinary course of amendment and made subject to a still more impossible



process, and strangely, and in an even more exaggerated form, this defect is to be found in the French constitution, where two subjects are excepted from *any* method of amendment whatsoever, viz., the form of the government and the disqualification of the descendants of former reigning houses for the presidency of the republic. These exceptions to the power of the legal sovereign in amendment are rotten spots in any constitution, and if not rooted out will spread and spread until their moldering influence will be felt throughout the entire system.

The practical and all-important question, however, is as to the way in which they can be eradicated, regularly and lawfully, and without recourse to revolutionary means. Take for example again the constitution of the United States, which declares, in the article of amendment, that "no state, without its consent, shall be deprived of its equal suffrage in the Senate." This means, of course, that if the attempt should be made to reduce the representation of any state in the Senate in relation to that of the other states, by the process of constitutional amendment,—and that is the only way, of course, in which it can be lawfully done,—this can be effected only with the consent of the legislature of, or of the convention in, the state whose relative representation it is proposed to reduce, together with the consent of one or the other of these bodies in enough of the other states to make out a three-quarters majority of the whole number; and that if the attempt should be made to increase the relative representation of any state, this can be effected only with the consent of every other state of the Union, given through its legislature or convention.

There is thus, theoretically, a way provided for expunging from the constitution this exception to the ordinary operation of the legal sovereign, the amending power, but practically it is utterly unworkable. If we are ever to rid

ourselves of this obstacle we must find some other way than that which I have just outlined as the apparently legal way. But is there any other legal way? Can the amending clause itself be revised by the ordinary course of amendment so as to omit the exception in behalf of the equal representation of the states in the Senate? It certainly can be so revised as to anything and everything else. But I am quite persuaded that the framers of the constitution never intended to provide *any* means whereby this exception could be set aside. I am quite sure that they intentionally placed this obstacle in the way of the legal sovereign, as they organized it for ordinary action. I do not feel sure that they realized the fact that they were sowing the seeds of revolution upon this subject by erecting an insurmountable barrier to regular constitutional progress concerning it. The great natural, universal, and irresistible principle of development was not then understood as now. Men really believed, at that stage in the growth of philosophic thought, that they could construct institutions for all time, which would need no change or improvement.

There is, indeed, good ground in *political philosophy* for holding that the amending clause in a constitution may itself be revised by the general process provided therein. These grounds are that there cannot be *logically* two legal sovereigns within a constitution any more than there can be two original sovereigns behind the constitution, and that there cannot be *logically* any exceptions from the power of the legal sovereign any more than there can be from the power of the original sovereign. Different methods of *governmental* action in regard to the same subject, and exceptions from the powers of the *government*, are all scientifically legitimate, but the exercise of *sovereignty* is an entirely different matter. One body and only one can possess it at any given time within a given state,

and from its operation nothing whatsoever can be logically excepted. But when we shift from the legal to the political in respect to this subject, are we not committing a revolutionary act? I think this must be acknowledged. It must be conceded that we are committing the same kind of a revolutionary act as that committed by the national constitutional convention of 1787 and the ratifying conventions within the states of the Confederation. If *that* was justifiable, *this* would be, and upon exactly the same grounds, viz., that existing legality upon this subject does not comport with the social, political, and economic conditions of a national democratic state, but contradicts them in an unendurable way and to an unendurable extent. Sound political theory demands that the amending power *within* the constitution, the *legal* sovereign, should be an organization faithfully representing the *original* sovereign *behind* the constitution, separate from, independent of, and supreme over, the powers of the government and the liberty of the individual, subject to no limitations or exceptions sufficiently facile in its action to meet all important exigencies, and when using the *governmental* organs at all in the making of constitutional law, using them in a *ministerial* but not in a *discretionary* capacity. And sound constitutional law demands the same things. Without them the system of constitutional government and constitutional liberty will not be able to stand in permanence. The invincible principle of development will force changes upon any and every constitutional system, as upon everything else in the universe, and if these changes cannot be made by *amendment*, by the *legal sovereign*, they will inevitably be made by the *government* or some part of the government, in Europe by the legislature as a rule, and in the United States by judicial approval of legislative or executive acts. But, by whichever of these two methods, it comes to the

same thing, viz., gradual governmental usurpation against the limitations of the constitution, the ultimate destruction of the constitutional system.

These are the considerations which lead me to hold that the first great problem, logically, of the constitutional law of the present is the construction of a proper provision for amendment which shall have the qualities which I have just outlined. Not a single great state in the world had such a provision in its constitution, and not a single one has anything approaching it, except, as I have said, France and Switzerland. Of these two, Switzerland has come nearest to it in the provision which allows an amendment to be proposed by fifty thousand Swiss voters and to be ratified and adopted by a majority of the Swiss voters, provided this national majority includes a majority of the voters in a majority of the cantons, and using the governmental organs at one or two points only and then only in a ministerial way. The great defect here is that throughout the whole process there is no place nor opportunity for any sufficient discussion of the project, and that is fatal to any sound development in human affairs.

The second great problem of the constitutional law of the present is, in my judgment, the proper construction of the upper legislative chamber.

With the exception of the princely power itself this is the oldest among national political institutions. The lower legislative chamber in the states of the present is a modern institution, based upon manhood suffrage, or very nearly that, and upon representation according to numbers; but the Senates are, in most cases, relics of medievalism, based upon a variety of sources as to tenure, and with little pretense of a distribution of the representation according to modern principles. These defects are to be found even in the Senates of some states which have been founded

since the close of the Middle Ages. I think it may be broadly affirmed that of the seventeen states of the civilized world worthy of mention as having a constitutional law, only four of them have solved the problem of the upper legislative chamber with anything like a fulfillment of the demands of modern theory or modern conditions, and these four are not states of the first rank in power. They are Sweden, Norway, the Netherlands, and Belgium. Moreover these four are all states with centralized governments, that is, states which are better situated than those having federal governments for the solving of this problem. Of these four, Sweden has come nearest, in my judgment, to the ideal modern solution, providing, in its constitution, for the election of the senators by the provincial assemblies and the municipal assemblies of such cities as are not under provincial government, all of which bodies are elected by the voters, and distributing the representation in the Senate according to population. This is both conservative and democratic, conservative in the method of the election, and democratic in the method of the distribution of the representation. In the Swedish legislature there is also absolute parity of powers between the two houses, both in the initiation and passage of legislation. Both houses come ultimately from the people, both represent the whole people, both rest upon the same principle of distribution of seats, viz., population, and both exercise the same power in legislation, fulfilling thus the four chief requirements for the Senate of a modern state.

Apparently the Norwegian Senate approaches as near the solution of the modern problem as the Swedish. But a little consideration of the details will show that this is not quite true. The Norwegians elect all of their legislators as *one* body; and when they all assemble as one body, the separation into *two* bodies is effected by drawing lots,

one-fourth of the whole number constituting in this manner the Senate, and three-fourths the other chamber. The main defect in this method of organizing a Senate consists in the fact that the Senate will be composed entirely of members coming from parliamentary districts not represented at all in the other chamber, and *vice versa*; that is, three-fourths of the parliamentary districts are entirely represented in one chamber and one-fourth in the other. This tends to the sectionalizing of views and to the weakening of the national consciousness and spirit, or at least, to the hindering of the development of the national consciousness and spirit. Then there is another defect. The one-fourth selected in this way and representing directly only one-fourth of the parliamentary districts cannot maintain a parity of power with the other chamber composed of members directly representing three-fourths of these districts. This is manifest in the provision of the constitution itself respecting the mode of legislation. If the two chambers cannot agree upon a project of law, the constitution orders that they shall, at last, unite in the one original assembly from which they proceeded and determine the matter there. This means, of course, that after a certain time the Senate must practically always succumb to the will of the other chamber. These are serious defects, so serious as almost to take Norway out of the category of states that have made most progress in the solution of the problem.

The members of the Netherlands Senate are chosen in the same manner and by the same kind of bodies as those of the Swedish chamber, but in the distribution of the seats some consideration is paid to the provincial lines, the distribution not being in exact accord with the principle of population, though not far away from it.

Finally, in the Belgian system, there is a complexity both in the method of choosing the senators and in the dis-

tribution of the seats, which amounts to a defect, in each respect. Most of the senators are chosen directly by the voters, and in the election of these, two deputy-parliamentary districts constitute one senatorial district. This is simple and democratic, although somewhat radical. The others are chosen by the provincial assemblies, and in the distribution of these among the several provinces much consideration is had to the provincial lines, the less populous provinces being favored. The purpose of this device is to offset the radicalness of the other part. This is certainly a makeshift. It would have been far more in accord with sound theory to have provided for the choice of all the senators by the provincial assemblies, while distributing the seats among the provinces according to population. There is nothing necessarily undemocratic in the practice of indirect election, but it is quite undemocratic to distribute the seats in any legislative body except in accordance with the principle of population, or at least something approaching that.

When now we turn to the construction of the Senate in the other thirteen constitutions, we find ourselves in the midst of a chaos in the practice with no consistent principle to guide us. Seats by virtue of hereditary right, as, most largely in the British, Austrian, and Hungarian constitutions, and partly in the Spanish, which is certainly medieval both in origin and spirit; seats by virtue of office, as in the same constitutions, which besides being, for the most part, also medieval, conflict with the modern principle of the incompatibility of office with legislative mandate; seats by royal appointment, as *partly* in the four systems just mentioned, with that of Denmark; as *almost* the *exclusive* principle in the construction of the German Bundesrath, and as the *exclusive* principle in the construction of the Italian and Portuguese Senates, excepting the seats of the

princes of the royal house, as a rule, the weakest sort of a Senate, being generally a sort of royal appendage, affording the crown no support, but bound to go down with it under popular assault; and finally seats by election, practically always in the indirect form, as *partly* in the systems of Spain, Hungary, Denmark, and Great Britain, and the *exclusive* principle in the systems of France, Switzerland, and the American states. The elective element in the British House of Lords and in the Hungarian Magnaten-Tafel is slight. In the Spanish system one-half of the senators are elected, and elected for a term of ten years; and in the Danish system fifty-four of the sixty-six members are elected, and elected for a term of eight years. These two are headed in the right direction is so far as the senatorial tenure is concerned.

But in neither of these cases, and in none of the cases where election is the sole source of the tenure, of course, the first four already treated of, and, of course, in none of the other cases, is there any approach to the modern democratic principle of distribution in legislative chambers.

It is about as certain as anything human can be that all the species of senatorial tenure, except that by election, will pass away. It may be expected that the tenure by hereditary right in Great Britain and that by royal appointment in Germany will be the last to yield. But they must all go sooner or later, and it is one of the great problems of constitutional law in all of these states to find the proper and natural substitutes for these antiquated forms or these modern makeshifts. It is also a great problem in those states which have already established the senatorial tenure, *in part*, by election, so to reform the senatorial electoral bodies as to make them more representative of modern conditions. As I have said there is no sound objection in modern political theory to the indirect election of senators,



but the electoral bodies must be truly representative bodies of the original voters, and they must exercise power in the election proportionate to the population which they represent. This is not the case in any of these. In all of them the original electorate for the senators is much narrower than for the members of the other chamber, and the weight exercised by the different electoral colleges is far from being proportionate to the population of the districts for which they act.

In the five states with republican governments, the ultimate source of the senatorial tenure is, naturally, the same as that of the membership of the other chamber, and in so far as that point is concerned they may be said to have solved this part of the senatorial problem. But when we come to the provisions of these constitutions which relate to the distribution of the senatorial representation, we find ourselves confronted with one of the gravest questions of their constitution law.

Let us consider briefly the facts in each case, beginning with France, as being a centralized government, and not having, therefore, the same reason for making concessions to the line of local government or administration as states with systems of federal government. The extremes in the senatorial representation are the *Département* of the Hautes Alps and the *Département* of the Seine. From the point of view of population, the mountaineers of the former district are about six times more strongly represented in the Senate than the inhabitants of the highly civilized city of Paris. The average discrepancy, however, is not at all so great. Nevertheless it is true that a minority of the population of France is represented by a majority of the seats in the Senate. It is a minority not far removed from the middle line, but still always a minority. It may also be said that the advantage lies, on the whole, rather with the

*Départements* which are moderately populous, although the greatest advantage lies with the least populous, and the greatest disadvantage with the most populous. While there is here a problem for the French statesmen, it is not of a very serious nature. More serious is the problem for them of regulating the weight of the communes in the senatorial electoral college for each *Département*. Here the smaller communes are, as a rule, much over-represented.

When now we turn from France to the states with federal governments, we become immediately aware that, in the distribution of the senatorial seats, other considerations than the modern doctrine of distribution according to population have been in all cases determinant.

In the first place, in democratic Switzerland we find the Canton Uri about thirty times more strongly represented in the Ständerath, or Senate, than the Canton Bern, and that the population in the twelve least populous cantons, not amounting to quite one-third of the population of the whole of Switzerland, is represented in the Senate by a majority of the voices.

Secondly, in the leading state of South America, Brazil, and in the leading state of Central America, Mexico, we find about the same conditions. The Brazilian commonwealth of Matto Grosso is, from the point of view of population, about thirty-four times more strongly represented in the national Senate than the rich and populous commonwealth of Minas Geraes, and the population of the eleven least populous commonwealths of the Brazilian Republic, numbering about 3,000,000 of souls, are represented by a majority of the voices in the national Senate, while the other ten commonwealths with a population of almost 12,000,000 of souls are represented by a minority of the senatorial seats. Likewise in the Mexican Republic, the commonwealth of Colima is, from the point of view of popula-

tion, about eighteen times more strongly represented in the national Senate than the commonwealth of Jalisco, and the population of the fifteen least populous commonwealths, numbering less than 3,500,000 of souls, are represented in the Senate by a majority of the voices, while the population of the thirteen more populous commonwealths, amounting to more than 10,000,000 of souls, are represented by a minority of the senatorial voices.

But it is the democratic republic of North America which exhibits the most thoroughgoing rotten borough Senate of any state in the civilized world. In this Union the smallest commonwealth, from the point of view of population, is Nevada, with 42,335 inhabitants, according to the last census, and the largest is New York, with 7,268,894. On the basis of representation according to numbers, the inhabitants of Nevada are about one hundred and seventy-five times more strongly represented than the inhabitants of New York. Again, there are now forty-five commonwealths in this Union, with a population of over 76,000,000 of souls. Of them about 14,000,000 reside in the twenty-three least populous commonwealths, and over 62,000,000 in the twenty-two more populous commonwealths. That is, 14,000,000 of people are represented in the United States Senate by forty-six senators, while more than 62,000,000 are represented by only forty-four senators. Of course, it may be said, and it is said, that in states with systems of federal government the members of the national Senate do not represent the people but the commonwealths of the Union, and that, therefore, the principle of representation according to population does not apply to the Senates of such states. Well, what is a commonwealth or state in a democratic republic with a federal government? Is it anything more than the organization of the people within a given district for their autonomous

local government? And is there any sound reason why a few people so organized in one district should be equally represented in either house of the national congress with a great many more people organized in another district for the same purpose? If it were always true that the smaller population possessed all the elements of intellectual and moral culture to a higher degree than the larger, it might be held, perhaps, as a principle of political ethics, that the representation of the smaller number should be relatively stronger than that of the larger. But who will say, for example, that the peasants and mountaineers of Uri are superior in knowledge and virtue to the citizens of Bern, or the miners of Nevada to the inhabitants of New York? I understand only too well that there are still those who will say that the reason for the equal representation of the commonwealths in the national Senate is that they are sovereign states, and that sovereignties are equal in representative right no matter what may be their relative strength in population or any of the other elements of power. My answer to this is that this is a principle of international law, not of constitutional law; that the commonwealths in these four systems which we are considering *are* not sovereign states; that in two of them they never *were* sovereign states nor anything like sovereign states; that in one of them, Switzerland, the most of them *were* once something like petty sovereignties under the Eidgenossenschaft and the Confederation of 1815-1848, but were deprived of that quality by the Swiss nation in 1848; and that in the other one, the United States, thirteen of them possessed something which they called sovereignty under the Articles of Confederation of 1781-1789, but were deprived of that quality by the national popular movement of 1787, culminating in the establishment of the national constitution instead of the quasi-international confedera-

tion, and that by the trial of arms of 1861-1865 the claim to sovereignty by any commonwealth of this Union was put forever to rest.

According to modern views, principles, and conditions, no rule of distribution of legislative seats in either chamber except that of population can rightfully prevail in a national democratic republic, no matter whether the governmental system be centralized or federal. Some concessions can, of course, be made to administrative convenience, but they must never amount to the permanent investment of a minority of the people with a majority of the voices in either branch of the law-making body, especially where this minority, and also the majority, are sectional in their composition and not general. Even if we accept the doctrine of minority representation, it would not justify the practice of sectional overweight, which we are considering.

As I have indicated in another connection, it will not be easy to deal with this problem in the United States and the German Empire. In the other states with federal governments this defect may be cured by the ordinary course of amendment, but in the United States and the German Empire this subject is excepted from the ordinary course of amendment and placed under the protection of a procedure which can, in all probability, never be applied so as to effect any change. Nevertheless, the question will have to be met, and the problem will have to be solved here as well as elsewhere. It may not be done, it probably cannot be done with exact legality, but we have the precedent in American constitutional history for a convention of the United States acting with conventions of the people in nine-thirteenths of the commonwealths to disregard the precepts of the existing law in the amendment or revision of the organic law. We can bring such bodies together by means and through forms already provided in the consti-

tution, and we can go back to the principle, as in 1787, that they are the sovereign *behind* the constitution and are not, therefore, bound by the exceptions from the legal power of amendment provided *in* the constitution. You may call this revolutionary. I think we shall have to concede the point, but it would be a revolution standing on the borderline between original sovereign action and legal procedure, and would, probably, be as bloodless as that of 1787.

The third great problem of the constitutional law of the present is, as I conceive it, the fixing of the fundamental relation between the legislative and executive branches of the government. The experience of the world has developed three fundamental systems of practice in regard to this subject. We may term them the presidential system, the parliamentary system, and the directorial system.

The principle of the first is substantial independence between the executive and the legislature, both in tenure and procedure. The tenure of the executive does not, according to this principle, originate in the legislature, and cannot for merely political reasons be determined by the legislature; that is, the legislature cannot impeach, or require the resignation of, the executive or his ministers merely on account of political disagreement with them. Nor, on the other hand does the tenure of the legislative members originate in the executive nor can the executive terminate their term by dissolution. Neither the executive nor any of his ministers have seat or voice or vote in the legislative chambers, but, on the other hand, the executive is furnished with a veto power upon all legislative acts practically strong enough to secure his prerogatives against legislative encroachment.

The principle of the second, the parliamentary system, is substantial harmony between the executive and the majority party in the legislature. This is established and

maintained by the constitutional requirements upon the executive to take his ministers from the leadership of the majority party in the legislature or the more popular chamber thereof, to follow the advice of his ministers, and to dismiss them from office, generally through the form of voluntary resignation, when they fail to receive the support of that majority upon fundamental questions, or else to dissolve the legislature or the lower chamber thereof, and appeal to the voters to restore the lost harmony, whose decision must be acquiesced in by all. Under this system the real executive is the ministry. It bears the responsibility for the executive acts. Its members have seat, voice, and vote in the legislative chambers, but no veto upon legislative acts.

The principle of the third, the directorial system, is the complete subordination of the executive to the legislature, that is, complete control of the executive tenure by the legislature, entire responsibility of the executive to the legislature, no power of dissolving the legislature or either branch thereof in the executive, no seat, voice, or vote in either of the legislative chambers except by order or permission of the chambers, and no veto upon legislative acts. On the other hand, while the executive is, as a rule, permitted to introduce measures into the legislature, their defeat or rejection does not call for the resignation of the directory or of that member of it particularly responsible for the project. He or they must simply submit to the will of the existing legislature in every case and go on under its instructions.

The presidential system goes naturally with the elected executive, the parliamentary with the hereditary executive, while the directorial system belongs scientifically nowhere. The directory is scientifically and historically discredited as an executive system. It exists in only one of the seven-

teen states which I have brought under this study, viz., Switzerland, and seems to be on the way of establishment in one other viz., Norway, where the successful insistence of the Norwegians that the King's Ministers shall sit in the legislature and shall resign when out of harmony with the legislative majority, without according the King the power of dissolving the legislature and appealing to the voters to settle the question in the new parliamentary election, is certainly tending to make the ministry a directorial board, completely subject to the legislature. Switzerland, being an internationally neutralized state, may make experiments with a weak executive. For Norway such a situation is more dangerous. In both cases it seems to me an unsatisfactory solution of the executive problem and to call for revision.

Of the other fifteen states, all that have hereditary executives, except the German Empire, Austria, and Hungary, have developed into or are developing into the parliamentary system substantially. They are, at least, all moving in the direction of the English model, and are destined to arrive, sooner or later, at something like the English result. All along the road, however, from their present stage of development of the system to its ultimate form, their problems are strewn, and their best course is to look to English experience and follow as nearly as somewhat different conditions will permit in English footsteps. It is most important to kings and emperors themselves that they should recognize the fact that the parliamentary system of relations between the executive and the legislature is a necessary contrivance for reconciling modern political thought and modern political conditions with the hereditary tenure of the executive. If they resist too far its establishment and development, they will simply provoke a republican revolution which will sweep them entirely away. The



royal imperial houses of Hapsburg and Hohenzollern, old and powerful and popular as they are, cannot in the long run resist this movement. It is the greatest constitutional problem, from the point of view of their own interests, with which they have to deal, and it behooves them to devote themselves to its thorough comprehension and its rational and natural solution.

With the exception of France, the states having elected executives follow the presidential system, Switzerland not being further considered. This is natural and rational, and I consider that in these the executive problem has been fairly solved to meet modern conditions and requirements. It is quite true that in the United States and Mexico the method of indirect election of the executive is criticised, and that in the practice of the United States the law for counting the electoral vote has, until recently, been quite faulty and is not yet entirely perfect, and that some advantage might conceivably be gained by allowing the presence of the cabinet officers in the houses of Congress to explain proposed executive measures or even to propose administrative measures, but these things are, from the point of view of this paper, matters of detail, and cannot be discussed within the limits of this essay.

It is the French Republic which is confronted with the serious problem in regard to the executive and its relations to the legislature. The French Republic is attempting to work the system of parliamentary government with an elected executive. From the points of view of historical experience and sound theory this appears as an unnatural, and, in the long run, unworkable combination. The real parliamentary system requires, as I have already remarked, not the complete subordination of the executive to the legislature, but harmony of action between the two, and a power in the executive either to dismiss his ministers or dissolve

the legislature in order to restore harmony upon important issues when it has been lost. No democratic people will intrust the executive with such power over the legislature, and if they would, the executive would not dare to use it. It requires all the historic power, prestige, and mystical influences of the hereditary executive, the so-called sovereign, to exercise such a power. The French have attempted to help themselves over this difficulty by vesting the power to dissolve the Chamber of Deputies in the President with the consent of the Senate, the Senate itself not being made subject to executive dissolution. This may give the President a certain backing which may enable him to act occasionally. It did so in one or two early cases. But this is no fulfillment of the requirements of the system. The executive *alone* must have the power of dissolution over the entire legislature, at least over the entire elected part of the legislature, and it is not sufficient that the executive shall have it over *only one* chamber of the legislature, and then only when sustained by the *other* chamber. Conflicts between the two *chambers* might be settled in this way, but not conflicts between the executive and the entire legislature, and the settlement of *such* conflicts is the prime purpose of the parliamentary system. When the relation prescribed by the French constitution was established, that instrument provided that the seventy-five senators, one-fourth of the whole number of senators originally chosen by the national convention which framed and adopted the constitution, should hold for life, and that their successors should be chosen by the Senate itself and also hold for life. Here was a certain nucleus of strong conservatism and executive support in the Senate. All that has been changed by the constitutional amendment of 1884, and the members of the Senate all proceed now ultimately from the same source as the Deputies. The French Senate has now ar-

rived at the consciousness of a solidarity of interest with the deputy chamber upon the subject of legislative prerogatives *versus* executive prerogatives, and the power of dissolving the Chamber of Deputies, intrusted to the French President under the more favorable conditions for its exercise just mentioned, has now become practically obsolete. The French system is, therefore, veering towards the directory. This will not serve for France, however it may work in Switzerland or even in Norway. France *must* have a strong executive. If France *will* have a parliamentary system, then France *must* have a king. If, on the other hand, France *will* have an elected executive, then France *must* have the presidential system. This is her great governmental problem. All others should stand aside until this is substantially solved.

The fourth great problem of the constitutional law of the present, as I view these problems, concerns chiefly, if not wholly, the United States. It is the question of extending the legislation of the central government further into the domain of private law, especially in the regulation of commerce and marital relations. The other states having federal governments, except Mexico, and, of course, all the states having centralized governments, have assigned these subjects to the legislation of the general government, and Mexico has gone much further than the United States in this direction.

Whatever may have been natural a century ago, when the settled parts of the commonwealths of this Union were separated from each other by comparatively impassable districts of primeval forest and there was comparatively little intercourse between them, now when these obstacles have entirely disappeared and intercourse is so active that no man knows when he passes from one commonwealth to another, it has become entirely unnatural and scarcely longer

endurable that the code of commerce should not be exclusively national. The existence of the common law as the basis of the law of the commonwealths upon this subject has minimized the difficulty of a great nation getting on with systems of local commercial law; but the differences in detail, at first hardly noticeable, have now, on account of the vast development in the complexity of these relations, become almost unendurable. This problem should be dealt with by constitutional amendment if possible. If not, then the United States judiciary must put a much more liberal interpretation upon the existing commerce clauses of the constitution. The distinctions between commerce "among the commonwealths" and commerce within the commonwealths have now become too attenuated to bear the strain much longer. They must go, or the federal system of government may break down entirely.

It certainly is not necessary for me to enter into any argument at all to show that the scandals of polygamy and divorce, which bring the blush of shame to the cheek of every true American, have their root in the system of local regulation of the subjects of marriage and divorce. These relations are fundamental in the civilization of a nation. Their proper regulation must rest upon the national consciousness of right and wrong. States' rights must give way upon this point, too, if they would stand in regard to those subjects which are not so completely national in their character. In fact, the whole system of federal government, that is, dual government under a common sovereign, is now under great strain, in consequence of the rapidly developing nations and national states. It is a question whether it can stand against the centralizing forces in modern political and civil society. It certainly cannot unless it yields the transfer of some subjects, such as those just mentioned, from local to central regulation. This has been

done in Switzerland, the German Empire, and Brazil, and in large degree in Mexico, and these United States must follow the same course of development or witness soon the same sort of a movement in universal reform as occurred in 1787.

The fifth and last great problem, or rather series of problems of the constitutional law of to-day which I shall consider in this paper, relates to civil liberty.

From the point of view of public law civil liberty, as distinguished from political liberty and moral freedom, is the immunity of the individual person within a given sphere against both the powers of the government and the encroachments of another individual or combination of individuals. Constitutional law should construct this sphere, define its contents in principle, fix its boundaries, and provide its fundamental guarantees and defenses. Usually this part of a constitution is called the Bill of Rights, although in its nature it is rather a Bill of Immunities.

Every written constitution in the civilized world, except that of France, contains such a division. Perhaps the constitution of the German Empire ought to be excepted, although the constitutions of the states of the Empire contain such provisions, and the Imperial Constitution itself, in slight measure, contains them. The reason why it does not contain them in larger measure is quite apparent. It is simply because the Imperial Government is one of enumerated powers. This is not a sufficient reason, as we know from American experience, and the imperial constitution should be amended in this respect, and the Imperial Government made subject to limitations on the one side, and charged with powers against the states of the Empire on the other, both in behalf of individual immunity against governmental power.

The first great problem, however, under this topic, is

the French question of amending the French constitution so as to introduce into it a series of provisions concerning the immunities of the individual person. It is quite surprising that the French instrument should be defective in regard to this matter. About every French constitution down to the present one has contained such provisions in much detail. In fact the French taught the European Continental world the doctrine of individual immunity against governmental power as a branch of constitutional law. It was at first thought that the omission of such a Bill of Immunities from the present French constitution was owing to the fragmentary nature of this constitution, but the French have now had nearly thirty years for the perfection of their instrument of organic law, and within this period they have had a constitutional constituent convention and have framed and adopted amendments to their constitution, but nothing of this nature was, I think, even proposed. We are, therefore, driven to the conclusion that the French statesmen and people do not consider such immunities for the individual to be necessary under their present political system, but feel, on the other hand, that, with an elective government in all parts and an executive dominated by the legislature, the individual is in no danger of governmental oppression. I do not know by what lessons of history or of more immediate experience the French have proved this doctrine to themselves. No government is more likely to ignore the natural limits between its powers and the immunities of the individual than an elective democratic government. The French have had this experience, more than one, themselves. I am, therefore, unable to regard this omission as anything less than a grave defect, presenting to the French a most serious problem of constitutional amendment.

As I have said, every other written constitution in the

world contains a Bill of Immunities, and it is nearly the same thing as to content in them all, but not a single European constitution provides any means for its lawful realization against the possible attempt of the legislature, and in some cases also of the executive, to encroach upon it, except perhaps petition to the government itself. That is to say, none of these European constitutions creates any judicial bodies vested with the power of interpreting constitutional limitations upon the powers of the whole government, and of restraining the government from breaking through them. Many of them leave even the *creation* of the judiciary and its investment with powers to legislative statute, which, of course, places the judiciary in a position of inferiority and subordination to the legislature. Others, while creating the courts by constitutional provision, fail to vest them with any such protective power. Even the constitution of Switzerland declares outright that the judicial tribunals shall have no power to pass upon the constitutionality of legislative acts.

The principle of European jurisprudence upon this point seems to be that the legislature is the proper protector of individual immunities against governmental power. In Europe, the title "government" is applied only to the executive, and the statement of the proposition as it presents itself to the European mind would be, that the immunities of the individual are protected against governmental encroachment by the representatives of the people. In America, on the other hand, we consider the legislature to be a branch of the government, and, therefore, it appears to us as a sort of Celtic hoax to speak of the government defending the immunities of the individual against itself. In fact some of our greatest statesmen have contended that the judiciary is also a branch of the government and that we are subjecting ourselves to the same kind of a hoax when

we imagine that the judiciary will, in the long run, protect the realm of individual immunity against governmental encroachment. It really appears, at times, as if they were right, and as if the judiciary were really casting its lot with the political branches of the government for the purpose of expanding governmental power at the expense of individual liberty. Still, on the whole, this has not been true. On the whole, a judiciary established directly by the constitution, composed of judges with life terms, sustained by a sound popular knowledge of what the immunity or liberty of the individual purports, and a general popular determination to uphold it, is the best possible organ to be vested with the protection of that immunity against governmental encroachment, as well as against encroachment from any other conceivable sources. It is the only real antidote for the socialistic doctrine in regard to civil liberty. That doctrine, stated in a sentence, is that the individual is subject, *at all points*, to the control of the majority. This doctrine is an absolute negation of the true principle of civil liberty. As we have seen, civil liberty is individual immunity within a sphere marked out by the constitution against governmental encroachment or encroachment from any other source. It is the constitutional realm of individuality. And if in any country all government and every organization and every individual, except only one, should stand upon one side, and the single individual upon the other, it would be the *constitutional* duty of the body charged with the function of maintaining civil liberty to protect that single one within this sphere against encroach-<sup>6</sup>ment from any and every source, and to summon the whole power of the nation to its aid, if necessary. And it would be the constitutional duty of those summoned to obey the call and render the aid required, although it might be directed against their own conceived views and interests. The



doctrine of the greatest good to the greatest number and the principle of majority rule have no application whatsoever within this domain. When a constitution is being framed or amended, then the question of the nature and extent of civil liberty or individual immunity is, indeed, a matter of highest policy for the *sovereign* to determine in accordance with its own forms of procedure, but once established, it becomes subject only to the provisions and principles of the constitution, interpreted by the organs of justice, and is removed entirely from the realm of legislative or executive policy and majority control. Now the only way to maintain this true idea and principle in regard to civil liberty is to put its protection under a non-political body,—the organs of justice, not the organs for the fixing of policies,—and to vest the organs of justice with the constitutional power to nullify any acts of the political branches of the government which may, in their judgment, undertake to encroach thereon. The legislature, in these modern times, is the branch of the government which is most prone to undertake these encroachments. The legislature is the branch which, by its very nature, regards everything as a matter of policy to be determined, at *each moment*, by majority action, and that action based upon majority will, not upon majority interpretation of higher law. It is the branch of the government which is almost sure to lose sight of the distinction between civil liberty, individual immunity, and what it conceives to be general welfare between justice and policy. It is absolutely certain to do so when a socialistic majority holds sway in the legislature. It was natural that the European peoples, accustomed to the despotism of the executive, with the courts as a branch of the royal power, should have come upon the idea, in the period of the revolutions,—that is, in the period of their transitions from absolute to constitutional government,—that the representa-

tives of the people in the legislature would be the only reliable support for civil liberty. Perhaps this was correct for that period and for those conditions. But I am sure that that period and those conditions have now passed, and that the realm of individual immunity is now in more danger from legislative, than from executive, encroachment. It is under the force of this conviction that I contend that the problem of creating an independent judiciary by constitutional amendment and vesting it with the protection of individual immunity against governmental encroachment, whether executive or legislative, or proceeding from any other source whatever, is one of the chief constitutional problems now confronting the European states. It will cost some effort to educate the European peoples up to an appreciation of this idea. How far they are away from it may be indicated from the fact when they immigrate into these United States, because this is a "free country," as they say, they almost always do what they can, when they do anything, to obliterate that great distinction between individual immunity and general welfare, justice, and policy, upon which, more than upon anything else, American liberty rests. The doctrine of the labor unions, which are predominantly European, both in their composition and tendencies, that an individual shall not be allowed to work upon such terms as he may be able and willing to make, because, in the conception of the majority of some labor union, or as for that, of all labor unions, it may be detrimental to their general welfare, is a good example of the profound ignorance on their part of this great American distinction and principle. Difficult, however, as it may be to instill the idea of this distinction into the European mind, still I am fully persuaded that the attainment by the European peoples of real constitutional government depends upon it. The alternative to it is, in the long run, legislative absolutism.

While I hold up the constitution of the United States as the model in this respect, yet I do not pretend that this model is entirely perfect. Two great problems have confronted the American practice during the last fifty years, neither of which has been satisfactorily solved, and I am afraid will not be so solved without further constitutional amendment.

The first has been produced by the contention concerning the meaning of the 13th and 14th amendments, which, with the 15th, make up the constitutional product of the Civil War. There is not much doubt that the intention of the framers of these amendments was to place the entire domain of civil liberty, individual immunity, under the protection of the United States authorities, and to vest the national judiciary with power to prevent encroachments thereon, not only when proceeding from the government of the United States and the governments of the states, but also when proceeding from combinations of individuals within the states. The Supreme Court of the United States has, however, held that these amendments did not extend the protecting power of the national authorities over this sphere to any such degree, but left the original control of the states over this domain unimpaired, except upon the specific points withdrawn by these amendments from that control, and that the national judiciary can protect the individual immunity provided in the 14th amendment only against encroachments attempted by the states, but not against those attempted by individuals or combinations of individuals within the states.

I contend that this is no satisfactory solution of the problem, because, in the first place, in a national state, although it may have a system of federal or dual government, sound political science requires that the entire individual immunity shall be defined, in principle, in the na-

tional constitution, and shall have the fundamental means and guaranties of its defense provided in the national constitution. The most fundamental and important thing in any free government is the system of individual immunity. Free government exists chiefly for its maintenance and natural enlargement. The contents of this immunity and the methods and means of its defense should, therefore, be determined by the national consciousness of right and justice. Any other principle than this belongs, not to the modern system of national states, but to the bygone system of confederated states. It was a resurrection of the doctrine of states' rights, in the extreme, when the Supreme Court of the United States put the interpretation which it did upon the new amendments, a doctrine which should have been considered as entirely cast out of this system by the results of the Civil War. This solution is unsatisfactory, in the second place, because it perpetuates the contention between the nation and the states concerning the control of this sphere, while if there is anything in a political system that ought to be made clear and fixed and simple it is this domain of civil liberty. The welfare and prosperity of the whole people depend upon it in a much higher degree than upon any other part of that system. Uncertainty about it and contention over it cannot result, in the long run, advantageously to the average citizen, however it may allow a larger license to the powerful.

The second problem under this head to which I would refer has been produced by the experience of the last six years of the Republic, in what is called its "imperial policy." This problem had to come sooner or later. No country with so high a civilization as the United States can keep that civilization all to itself in the present condition of barbarism or quasi-barbarism throughout the larger part of the world. It must share its civilization with other peo-

ples, sometimes even as a forced gift. This is nature's principle, and no civilized state can permanently resist its demand. It came rather suddenly upon our country, and some of us thought that we were not quite prepared for it, that we had not yet placed our own house in order. But every student and observer of the world's history and the world's methods knows that civilized nations are not, in the great world-plan, allowed to delay the discharge of the duty of spreading civilization until, in their own opinion, they are ready to proceed. Something always happens to drive them forward before they are perfectly prepared and equipped for the great work. And so before the United States had fashioned its constitutional law to meet the exigencies of a colonial or imperial policy, the possession of insular territory was thrust upon the great Republic. We had to take first, and then, by force of necessity, adjust our political situation to the requirements of the situation. It has not been an easy problem, and no one pretends that we have solved it perfectly or completely. The Congress, the executive, and the courts have shared in the work and in the responsibility, but candor compels us to say that if we are to continue in this sort of work, it would be desirable, to say the least, so to amend the constitution as to relieve the different branches of the government from the necessity of making usurpations of power, or something very like it, to meet urgent conditions.

It is only since the 21st of June of the present year that we have been able to state with any certainty what the colonial policy, or imperial policy, of the Republic is. I think it can be now briefly expressed. It is that all of the territory of the North American continent over which the sovereignty of the United States shall become extended will be made ultimately states of the Union, and that all extra-continental territory over which it shall become ex-

tended will be made, ultimately, either states of the Union, as possibly the Hawaiian Islands and Porto Rico, or be erected into still more completely self-governing communities than states of the Union, under the protectorate of the United States, that protectorate to be exercised chiefly for the purposes of preventing them from lapsing into barbarism internally or from becoming a prey to the greed of other powers, as Cuba already, and later on the Philippines. This is a policy worthy of the great Republic. It is the true imperial policy for a great civilized state engaged in the work of spreading civilization throughout the world. In comparison with it, the colonial policies of other countries appear mean and sordid and altogether lacking in the element of altruism necessary to real success in executing the mission of civilization.

Following such a noble policy as this, it is not difficult to forecast something of the future of this country. I would venture to say that the child is now born who will see the states of this Union, stretching from the Isthmus of Panama to the North as far as civilized man can inhabit, peopled by two hundred and fifty millions of free-men, exercising a free protectorate over South America, most of the islands of the Pacific, and a large part of Asia. We possess already the extremes of this vast continental territory as well as the great heart of it, and the most important Pacific islands, and we have already a footing of influence in Japan and China hardly enjoyed by any other power. The exalted policy which I have declared to be the imperial policy of this nation cannot fail to extend that influence, prestige, and power almost beyond measure.

Do not understand me as claiming the development of such a policy for the party at present in power in Congress and the present administration without the aid of their party opponents. I am not at all sure that, in the immedi-

ate enthusiasm of victory, and under the necessity of exercising temporary absolutism in government in the newly acquired territories, the party in power would not have lost sight of the real purpose of their work in the world's civilization except for the earnest expostulations of their opponents calling them back to the contemplation of the historic principles of the Republic. I rather fear they would. This noble policy is, therefore, the resultant of two forces rather than the direct product of one. It is the policy of the nation rather than of any party within the nation or of any part of the nation. As such it is sound and true and unchangeable, and is destined to be pursued no matter what party shall hold the reins of the government.

But we have some constitutional difficulties in the way of the realization of this policy. These difficulties relate to the constitutional powers of the United States Government and the limitations imposed thereon in behalf of individual immunity within newly acquired territory. It is settled that the United States Government may acquire territory for the United States by treaty or conquest; that it may set up a temporary military régime therein against which there is no constitutional immunity for the individual; that it may relinquish possession of the same to its own inhabitants or another power, either absolutely or under such conditions in the form of a treaty as may be agreed upon by the parties, and may enforce the stipulations of the agreement in such ways as may have been agreed on, or in such ways as are recognized by the customs and practices of nations; or that it may perfect its acquisition and transform the temporary military despotism therein into such civil government as Congress may establish, under the limitations of the constitution in behalf of civil liberty. I say that these points are all well settled. But there is

some question about the power of the United States Government to exercise a protectorate over peoples occupying territory which is not a part of the United States, especially when that protectorate shall not have been established by treaty and shall not be exercised under the forms of international agreement or custom. There is not a word in the constitution expressly authorizing it, and it is a grave question as to whether there is a word from which such power can be implied.

Moreover, it has appeared desirable, perhaps I should say absolutely necessary, to the United States Government to make the transition from military despotism in the government of some of these new acquisitions to a first and temporary form of civil government without constitutional limitations in behalf of individual liberty, that is, to a temporary civil despotism or something of that nature, and for this it is extremely questionable whether there is any warrant in the constitution. In order to meet the wishes of the government, or perhaps the necessities of the government, in this respect, the Supreme Court of the United States has so strained its powers of constitutional interpretation as virtually to enact, in the opinion of a large number of the best citizens of the country, constitutional legislation,—constitutional legislation, too, which, upon one point at least, contradicts the prime purpose of the only legitimate imperial policy which a free republic can have. It is quite possible that the state of society and of the population in a newly acquired district may necessitate more summary judicial processes than those of the juries, and that public security and even individual liberty will be better protected under the more summary forms, and that, therefore, a judicial interpretation of the constitution relieving the government from these limitations as to process in such districts would have a moral ground at least to stand



on, but when the court allows the Congress to overstep the constitutional limitations on the government in behalf of the freedom of trade and intercourse between the people of such districts and the people in other parts of the United States, and to erect a special tariff against such trade and the intercourse and thus to destroy, or at least greatly weaken, the prime means of extending civilization to the inhabitants of such districts, viz., a free commerce in mind and things, then neither the court nor the Congress nor the administration has any ground of any sort on which to stand, and we need an amendment to the constitution to express the reason and the will of the sovereign upon that subject.

We have in this whole question of territorial expansion one of the greatest problems of the constitutional law of this Republic, one which affects the whole world. It affects first of all the Republic itself, because upon its rightful solution depends the moral right of the Republic to have any imperial policy at all. It affects the peoples of the dark places of the world, who, though apparently unable to secure the blessings of civilization for themselves, certainly have the right to be left in their barbarism unless the intruding nation comes with a chiefly altruistic purpose. And it affects the other civilized powers in the example which it shall furnish them for their own work in the spread of civilization, for if the great Republic pursues an egoistic policy, they will certainly do likewise, and it is to be hoped that if it takes the other and the true course, they will not go in the opposite direction. No grander mission can be imagined than that which is now open to this American nation, and the time is now ripe for the sovereign people to discuss it in all its bearings, independently of ordinary party politics, and to write in the constitution the methods and means which the government may employ, the purposes

which its activities must subserve, and, above all, the limitations upon the government in behalf of the civil liberty of every individual who may be brought under its jurisdiction or protection in realizing this transcendent mission, the civilization of the world.

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*(Prepared by the courtesy of Dean George W. Kirchwey, Columbia University)*

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